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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE 169th JUDICIAL DISTRICT COURT OF BELL COUNTY, TEXAS

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Petitioner Michael Anthony Maness, a licensed attorney admitted to practice before the courts of the State of Texas and before the Supreme Court of the United States, respectfully prays that a writ of certiorari issue to review a final judgment rendered on September 28, 1973 by Respondent James R. Meyers, presiding by special designation as Judge of the 169th Judicial District Court of Bell County, Texas, who found the Petitioner guilty of criminal contempt of court and sentenced him to pay a $500 fine.

THE OPINION BELOW

No formal written opinion was filed by the Court below in connection with the contempt judgment against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of this petition at pages 27-29. Filing of the petition was timely under Rule 22(1) of the Court.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3). For the following reasons, the contempt judgment entered by the Respondent against the Petitioner constitutes a final judgment or decree rendered by the highest court of the State of Texas in which a decision could be had.

Under established Texas law "there is no right to an appeal from an order of contempt. The *only* remedy to review such an order is by writ of habeas corpus, *when relator is in custody.*" *Arnold v. State*, 493 S.W.2d 801 (Tex.Cr.App., 1973) (emphasis added); *Gardner v. State*, 171 Tex. Cr. R. 521, 352 S.W.2d 129 (1961); *Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 827 (1960); *Wagner v. Warnasch*, 156 Tex. 334, 295 S.W.2d 890, 893 (1956). Since the judgment of contempt imposes only a fine rather than imprisonment as punishment, the Petitioner has never been "in custody" to the extent of being physically confined in a jail; by its terms the contempt judgment allowed a grace period of approximately two weeks for payment of the fine, permitting the Petitioner to remain at large on a personal recognizance bond while seeking further review of the matter in the Texas appellate courts.

Mistakenly believing that the unsatisfied contempt judgment, the continuing obligation to pay the fine, and the restriction on freedom of action necessarily implicit in the giving of his personal recognizance bond would support the exercise of State habeas corpus jurisdiction,[1] the Petitioner presented a motion for leave to file an original application for the writ of habeas corpus in the Texas Court of Criminal Appeals on October 11, 1973.[2] On the same day the Court denied that motion by an order reproduced in Appendix B of this petition at page 33.

Immediately thereafter, again on the same day (October 11, 1973), the Petitioner filed an identical application in an unsuccessful effort to invoke the original habeas corpus jurisdiction of the Texas Supreme Court.[3]

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1. *Cf. Jones v. Cunningham*, 371 U.S. 236 (1963); *Marden v. Purdy*, 409 F.2d 784 (5 Cir., 1969).

2. As the State's highest appellate court in criminal cases, the Court of Criminal Appeals has consistently regarded the exercise of its original habeas corpus jurisdiction as the exclusive remedy (subject to the exceptions noted hereafter) in all cases of civil or criminal contempt resulting in actual physical imprisonment. See, e.g., *Ex parte McDonald*, 447 S.W.2d 938 (Tex. Cr. App., 1969).

3. As the State's highest appellate court in civil cases, the Supreme Court exercises original habeas corpus jurisdiction limited exclusively to situations in which an individual has been confined for disobedience of an order, judgment or decree in a civil proceeding. *Ex parte Morris*, 162 Tex. 530, 349 S.W.2d 99, 101 (1961); *Ex parte McDonald*, 441 S.W.2d 828 (Tex. S.Ct., 1969).

Similarly, the Texas Courts of Civil Appeals (the State's intermediate appellate courts in civil cases) exercise original habeas corpus jurisdiction limited exclusively to situations in which an individual has been confined for disobedience of an order, judgment or decree in a

The order denying relief is reproduced in Appendix C of this petition at page 34.

Because the terms of the contempt judgment provided that the $500 fine was to be paid by noon on the following day (October 12, 1973), the Respondent entered an order continuing the Petitioner on his personal recognizance bond, despite his failure to pay the fine, in order to permit the filing of a petition for the writ of certiorari in this Court.

In these circumstances the peculiarities of Texas contempt law have left the Petitioner without a remedy. There is no direct appeal from a judgment of contempt. The denial of habeas corpus relief by both the Court of Criminal Appeals and the Texas Supreme Court is consistent with previous decisions that refuse to permit a collateral attack on an unsatisfied judgment imposing a fine, even though the judgment may be (1) otherwise unappealable, (2) subject to instantaneous enforcement by coercive confinement through the issuance of a capias or writ of attachment, or (3) secured by a personal recognizance bond. *Ex parte Nichols*, 158 Tex. Cr. R. 218, 254 S.W.2d 518 (1952). Mandamus is also unavailable, apparently on the theory that habeas corpus will be available if the individual is actually taken into physical custody. *Deramus v. Thornton*, 160 Tex. 494, 333 S.W.2d 824, 831 (1960) (on motion for rehearing). In short, a contempt judgment imposing only a fine is not reviewable in any Texas court if the contemnor is not literally "in custody," the situation that exists here.

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divorce, support or child custody proceeding. *Ex parte Hosken*, 480 S.W.2d 18, 24 (Tex. Civ. App., 1972).

Although the Petitioner was not adjudged in contempt of court for having violated a judicial order, judgment or decree, he nevertheless sought habeas corpus relief from the Texas Supreme Court as a precautionary measure in an effort to pursue every potentially available remedy; no others remained.

For the foregoing reasons, the contempt judgment against the Petitioner constitutes a final judgment or decree to which this Court's certiorari jurisdiction extends under 28 U.S.C. § 1257(3). *Stanford v. Texas*, 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960); *cf. Largent v. Texas*, 318 U.S. 418, 421-22 (1943); *Powell v. Texas*, 392 U.S. 514, 517 (1968); *Grovey v. Townsend*, 295 U.S. 45, 47 (1935).

QUESTIONS PRESENTED

1. Whether an attorney who in good faith advises his client to invoke the Fifth Amendment privilege against self-incrimination, and who is thereafter adjudged in contempt of court solely because the client follows that advice by refusing to comply with a subpoena duces tecum demanding a potentially self-incriminatory production of documentary evidence, is thereby deprived of rights guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments.

2. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that have previously been displayed for commercial distribution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims are grounded primarily on the Fifth Amendment privilege

against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights, and the Fourteenth Amendment guarantee of due process of law.

The relevant provisions of the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) are reproduced in Appendix D of this petition at pages 35-36.

STATEMENT OF THE CASE

On February 1, 1973 the Petitioner appeared as one of the counsel of record for the Defendants in the trial of Cause Number 57,284-C, *The City of Temple, Texas v. Michael McKelva, Allen Boyer and T. C. McKelva, et al.*, an action then pending before the 169th Judicial District Court of Bell County, Texas, the Honorable J. F. Clawson presiding. In this suit the City of Temple, as Plaintiff, sought a permanent injunction under section 13 of Article 527 of the Texas Penal Code to restrain the Defendants from selling allegedly obscene matter in violation of both Article 527 and the provisions of a virtually identical municipal ordinance (purporting to regulate obscenity through the imposition of criminal sanctions) that had previously been enacted by the City and under which Defendants Michael McKelva and Allen Boyer had previously been tried and convicted [Tr. 2-11; S.F. 21-22A].[4]

4. The abbreviation "Tr." refers to the Transcript in Cause Number 57,284-C; "SF" refers to the Statement of Facts (transcript of testimony) of the hearing on the application for a permanent injunction in that cause; "SFC" refers to the Statement of Facts of the Petitioner's contempt hearing.

Two days before the trial of Cause Number 57,284-C, on January 30, 1973, Defendant Michael McKelva had been served with a subpoena duces tecum directing him to produce fifty-two named magazines before the 169th Judicial District Court at 9:00 a.m. on February 1, 1973 and to appear before the Court at that time to give testimony as a witness in the trial of the City's application for a permanent injunction. The subpoena identified the magazines only by title, without further description of any sort, and was issued by Mr. Hugh L. Taggart, Clerk of the Court, at the request of Mr. William T. Wilson, counsel and City Attorney for the Plaintiff City of Temple [Tr. 27-28].

Prior to the trial of Cause Number 57,284-C, Petitioner's co-counsel filed a timely motion to quash the subpoena on behalf of Defendant Michael McKelva [Tr. 29-30], contending in that motion that compulsory production of the magazines pursuant to court process would contravene Mr. McKelva's privilege against self-incrimination. The motion to quash was thereafter orally argued before the Court on February 1, 1973, after counsel for both sides had stipulated in open court that Mr. McKelva did not possess or have access to five of the fifty-two publications named in the subpoena [S.F. 5-6, 10].

With respect to the remaining forty-seven magazines, as counsel for Mr. McKelva, the Petitioner urged in his argument before the Court on the motion to quash the subpoena that the publications in question dealt "explicitly with acts of a sexual nature" and that, particularly in view of the preceding criminal prosecutions that had been initiated against Mr. McKelva by the City of Temple, production of any of the magazines under the compulsion

of a subpoena duces tecum would entail a real, appreciable and substantial possibility of self-incrimination [S.F. 6-10].

Following this argument Judge Clawson thereupon overruled the motion to quash [S.F. 15], after which counsel for both sides stipulated in open court that Defendants Michael McKelva and Allen Boyer had previously been convicted in the Municipal Court of the City of Temple, Texas in seven criminal cases involving the sale of allegedly obscene matter [S.F. 21-22A].

Michael McKelva was then called by counsel for the Plaintiff to testify as a witness on behalf of the City, and the following transpired:

"BY MR. WILSON:

Q. State your name and occupation to the Court, please.
A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.
Q. And is that Mike's Newsstand at 118-A South First Street?
A. Yes, sir, it is.
Q. Mr. McKelva, were you served with a subpoena requesting you to bring certain magazines, certain titled magazines to Court today?
A. Yes, sir, I was.
Q. And do you have those with you here today?
A. Sir, under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.
Q. Do you recall the day when you were served with a copy of this subpoena?
A. Yes, sir, I do.
Q. And what was that day?

A. I believe that was day before yesterday.
Q. Did you at that time have in your possession the magazines listed in the subpoena?
A. Under the advice of Counsel, I plead the Fifth.
Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?
A. Under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.
MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court." [S.F. 22A-24]

Thereafter, following a discussion between the Court and counsel with respect to the procedural adequacy of the subpoena and the tender of costs of production and witness fees [S.F. 24-28], the Court determined that Mr. McKelva would be permitted a reasonable opportunity to secure the forty-seven magazines and to produce them in court that afternoon [S.F. 29-30]. The Plaintiff City of Temple then continued with the presentation of its evidence.

When the Court reconvened after the noon recess, Michael McKelva was again called to the witness stand, and the following exchange transpired:

"BY MR. WILSON:

Q. You are the same Michael McKelva who was testifying earlier here in Court?
A. Yes, sir, I am.
Q. And are you further the same Michael McKelva who was instructed earlier by the Court on this day, the 1st day of February, 1972, in open Court to bring with you to Court at 1:00 o'clock certain magazines listed in the subpoena duces tecum with which you testified that you were served?
A. No, sir. It was 1973.
Q. I am sorry, you did not answer my question. Are you the same person?
A. No, sir, it was in 1973.

THE COURT: Apparently you are saying 1972, Mr. Wilson, instead of 1973. Try your question again.

Q. (BY MR. WILSON) All right, 1973, and I'm sorry.
A. Yes, sir.
Q. I am sorry, but I just haven't got over the change of the year yet.
A. Yes, sir.
Q. Do you have those magazines for the Court today?
A. No, sir.
Q. You do not?
A. No, sir.
Q. Have you attempted to secure those magazines?
A. No, sir.
Q. Have you made any effort at all to obtain those magazines?
A. No, sir.
Q. Were you fully aware at the time of the Court's instructions to bring certain magazines before the Court?
A. Yes, sir.

Q. Is it your testimony then that you are wilfully refusing to bring those magazines pursuant to the request made to you by the Court?
A. Yes, sir." [S.F. 77-79]

Following Mr. McKelva's second refusal to comply with the subpoena and the Court's order to produce the magazines, counsel for the City of Temple offered into evidence an affidavit establishing the tender of the witness fee, after which the following occurred:

"THE COURT: Do you have any questions that you want to ask this witness at this time?

MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.

THE COURT: All right.

MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?

A. Yes, sir, I do.

MR. MANESS: That is all I have, Your Honor.

THE COURT: You may stand down, Mr. McKelva." [S.F. 80-81]

The Court thereupon found Mr. McKelva to be in contempt of court and held, over the Petitioner's strenuous objection, that the witness's failure to respond to the subpoena would be regarded as an admission that the publications named in it were obscene. Judge Clawson deferred the imposition of punishment until the conclusion of the trial, and the City continued with the presentation of its evidence.

The testimony of Sergeant Vernon McKenzie, an officer of the Vice Division of the Temple Police Department, revealed that the titles of the magazines named in the subpoena served on Michael McKelva had been obtained by the Sergeant during the course of his investigation of Mr. McKelva's newsstand on January 4, 1973 [S.F. 109]. Sergeant McKenzie testified that at that time he had made a written list of the titles of those magazines he suspected were displayed in violation of the Temple obscenity ordinance [S.F. 110]. However, on cross-examination, Sergeant McKenzie admitted that he had no independent recollection by which he could identify any of the magazines whose titles he had listed, that he had viewed only the partially concealed covers of the publications and not their contents, and that he could not describe the cover of any specific magazine. The relevant testimony is as follows:

"Q. These items that are contained on the list that has been marked Exhibit C-8, did you at any time examine the contents of these?

A. No, not the contents.

Q. All right, you never opened the cover or saw what was on the inside of these magazines?

A. No, I did not.

Q. Then for all you know they could have been filled with printed material, just writing or printed material, with the pictures just on the front and the back?

A. Yes.

Q. You could not testify otherwise, could you?

A. I could not testify either way.

Q. You testified as to what appeared on the outside of some of these materials was similar in nature to what appeared on the outside of some of the other

matters. If I were to ask you questions concerning specific issues, could you tell me what that issue showed?

A. No, I could not.

Q. Then it is correct, is it not, that you could not describe to the Court what is on the outside of each of these magazines?

A. I could describe that on most of these magazines the same type of little white coverings were on them.

Q. All right, but as to what was depicted on the exterior of the magazine, you could not testify as to what was on the exterior of the magazine, could you?

A. No, sir, I could not other than that they were similar to these.

Q. But you could not testify as to the specifics of the similarity, could you?

A. No, I could not." [S.F. 119-121]

No other evidence regarding the specific character or identity of the forty-seven magazines was introduced during the course of the trial.

At the conclusion of the trial on February 2, 1973, the Court reconvened and the following transpired:

"THE COURT: Counsel, does either side have anything further that they want to put in evidence?

MR. WILSON: No, sir, the Plaintiff does not.

MR. MALEY: No, Your Honor, the Defendant does not.

THE COURT: The Court will recall the Defendant Michael McKelva to the witness stand.

MICHAEL McKELVA

(RECALLED.)

THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would.

MR. MANESS: Thank you, sir, and that is all.

THE COURT: Do you have any questions, Mr. Wilson?

MR. WILSON: No questions, Your Honor.

THE COURT: You may step down, Mr. McKelva. (Witness excused.)" [S.F. 149-150]

The Court then entertained the closing arguments of counsel and, after a short recess, found that all forty-seven magazines named in the subpoena were obscene "by admission of counsel." At this point Judge Clawson made the following statement from the bench:

"This Court is finding not only Mr. Michael McKelva in contempt of this Court but is also finding Mr. Maley and Mr. Maness as his attorneys guilty of contempt of court.

In each of these cases the Court is fixing the punishment for this contempt at ten days confinement in the Bell County Jail and a fine of two hundred dollars." [S.F. 153]

Petitioner's co-counsel thereupon excepted to the ruling of the court, gave oral notice of appeal, and requested a reasonable opportunity to appear and show cause on the contempt citation against the attorneys. The following transpired:

"THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find Counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frustrated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.

This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.

I have found you in contempt because you have usurped the authority of this Court.

You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion

and you will be released on bond and this matter will be set for hearing before another Judge, who will be appointed by the Administrative Judge of this District.

MR. MANESS: Your Honor, may I be heard in my own behalf on one point?

THE COURT: Yes, sir.

MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather what we have is where there is a philosophical difference between counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.

THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.

This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.

MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention

or our purpose to offend the Court, and in that respect we apologize." [S.F. 157]

During this exchange Michael McKelva was escorted from the courtroom by a deputy sheriff and summarily jailed. As an officer of the Court the Petitioner was permitted by Judge Clawson to post a personal recognizance bond in order to secure his release pending trial of his guilt or innocence before another District Judge in accordance with the provisions of Article 1911a, section 2(c) [Appendix D, page 35], of the Revised Civil Statutes of Texas.

On February 6, 1973 Judge Clawson entered a formal written judgment finding Michael McKelva in contempt of court for having refused to obey the subpoena duces tecum and also finding the Petitioner in contempt for "advising and counseling the said Defendant to disobey said subpoena" [Tr. 31-32].

Judge Clawson also notified the Honorable Herman Jones, presiding judge of the Third Administrative Judicial District of Texas, that the Petitioner had been held in contempt of court, that he had requested trial before another District Judge, and that he had been released on his own recognizance. Judge Jones then designated the Honorable James R. Meyers, presiding judge of the 126th Judicial District Court of Travis County, Texas and the Respondent herein, to preside at the contempt trial of the Petitioner in the 169th Judicial District Court. The trial was held in Belton, Texas on May 11, 1973 at 10:00 a.m.

At that trial a representative of the Attorney General of Texas appeared in support of the contempt adjudication at the request of Judge Clawson. By agreement of counsel for both sides in open court, with the concurrence

of Judge Meyers, the case was tried exclusively on the basis of the record in Cause Number 57,284-C [S.F.C. 5-10]; no additional testimony or other evidence was presented to the Court.

With respect to the merits of the contempt adjudication, the Petitioner advanced two distinct defenses in his trial before Judge Meyers:

First, the Petitioner contended that Judge Clawson's order to produce the forty-seven magazines was altogether void in view of Michael McKelva's legitimate invocation of the Fifth Amendment privilege against self-incrimination, thereby precluding a determination that advice to disregard it constituted a contempt of court. [S.F.C. 11].

Secondly, the Petitioner argued that production of the magazines would have risked an irrevocable surrender of the Fifth Amendment privilege against self-incrimination in the absence of any effective judicial remedy for testing the legality of Judge Clawson's order prior to the time compliance was demanded, and that under these circumstances an attorney's professional obligation to his client would justify advising non-compliance. [S.F.C. 54-56].

At the conclusion of the trial Judge Meyers indicated that he was not prepared to rule on the matter immediately and requested that counsel for both sides submit additional legal memoranda on the questions of law involved. Following the adjournment of the proceedings, counsel promptly complied with the Court's request.

Thereafter, on September 28, 1973, Judge Meyers signed a judgment of contempt that affirmed, on the basis of the entire record in Cause Number 57,284-C, the finding of guilt entered by Judge Clawson against the

Petitioner. That judgment assessed a fine of $500 in lieu of the punishment imposed by Judge Clawson and further provided that the fine was to be paid to the Clerk of the 169th Judicial District Court not later than 12 o'clock noon on October 12, 1973, a procedure designed by Judge Meyers to allow the Petitioner an opportunity to secure further appellate review of the contempt judgment without being forced to undergo actual physical imprisonment because of non-payment of the fine [S.F.C. 64-67]. Both judgments of contempt are reproduced in Appendix A of this petition at pages 27-32.

On October 11, 1973, after being advised that both the Texas Court of Criminal Appeals and the Supreme Court of Texas had declined to review the validity of the contempt judgment on its merits, Judge Meyers signed an order permitting the Petitioner to remain at large on his personal recognizance bond, despite his failure to pay the fine, to allow the filing of a petition for the writ of certiorari in this Court.

REASONS FOR GRANTING THE WRIT

This case seems to be unprecedented. Apparently for the first time in the reported history of Texas criminal jurisprudence—and possibly for the first time in the recorded history of the Anglo-American common law—an attorney has been adjudged in criminal contempt of court for having advised a client of his right to assert the Fifth Amendment privilege against self-incrimination. The Court is thus confronted with a contempt judgment of extraordinarily serious dimensions, involving the perennial conflict between an attorney's professional obligations as an officer of the Court and his equally solemn commit-

ment to provide the effective assistance of counsel guaranteed to his client by the Sixth Amendment to the Constitution of the United States.

In the past the Court has repeatedly regarded the dilemma as one that presents substantial Federal questions requiring definitive review and resolution through the exercise of certiorari jurisdiction. The classic example is *Fisher v. Pace,* 336 U.S. 155 (1949), in which a Texas attorney who is now the Chief Judge of the United States District Court for the Eastern District of Texas persistently disregarded the Trial Judge's ruling in a workmen's compensation case that the method of computing recovery was not to be argued to the jury. Another decision in the same vein is *Hickman v. Taylor,* 329 U.S. 495 (1947), involving an attorney named Fortenbaugh who was forced to go to jail to protect the confidentiality of communications from his client before his right to do so was ultimately upheld by this Court in an opinion that has since become a landmark in the law of Federal discovery. See also *In the Matter of Green,* 369 U.S. 689 (1962).

These cases vividly demonstrate that the issue involved here is not whether the Petitioner will eventually pay a $500 fine and suffer the continuing stigma invariably associated with a criminal contempt judgment against a lawyer. Rather, the issue is whether every member of every bar of every Court in this country may continue to provide confidential advice to his client regarding the right to assert the privilege against self-incrimination without the lingering fear that some Judge, on his own initiative, will call the client to the witness stand in an effort to squeeze out testimony designed to provide a supposed evidentiary basis for holding the attorney in contempt of court.

From its inception the contempt judgment against the Petitioner has been grounded on the misconception that Michael McKelva was somehow not entitled to assert the Fifth Amendment privilege because the forty-seven magazines named in the subpoena duces tecum had previously been displayed for commercial distribution. This theory apparently proceeds on the dual premises that the privilege protects only "private" (in the sense of "confidential") communications and that an individual who displays magazines for sale has thereby "waived" any right he might otherwise have claimed to the protection of the Fifth Amendment.

In terms of both constitutional history and constitutional logic, the premises are demonstrably false. Unlike the Fourth Amendment, the historical origins of which reflect a primary concern for averting unwarranted assaults on individual privacy, the Fifth Amendment serves the additional and entirely distinct function of sheltering an individual from the hazards of producing testimonial evidence against himself, even if the information provided as evidence is otherwise universally known. To cite only one obvious example: the Fifth Amendment would have protected Jack Ruby against being subpoenaed to testify before a Dallas County grand jury that he shot Lee Harvey Oswald, despite the fact that millions of television viewers saw him do it. The right of privacy is not the source of the admonition that, under our accusatorial system of justice, "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White,* 322 U.S. 694, 698 (1944). That axiom of our constitutional heritage remains unchanged, regardless of whether the proof extracted is denominated as "public" or "private."

Nor is the concept of "waiver" any more persuasive. At least since the landmark decision in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Court has consistently indulged every reasonable presumption against the waiver of fundamental constitutional rights and has repeatedly refused to infer acquiescence in their loss from mere inaction or a silent record. *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Smith v. United States*, 337 U.S. 137, 150 (1949); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Boykin v. Alabama*, 395 U.S. 238 (1969). That strong presumption applies with undiminished force to the Fifth Amendment privilege against self-incrimination. *Marchetti v. United States*, 390 U.S. 39, 51-52 (1968).

Moreover, even apart from the fact that the forty-seven magazines were themselves testimonial or communicative in character, compulsory production of them pursuant to court process would also have been an intrinsically testimonial or communicative act to the extent that such production authenticated or verified the identity of the magazines as those sought by the subpoena; there is no other evidence in the record by which such identification or authentication could have been established. Accordingly, a previous public display of the material could not "waive" the testimonial disclosure implicit in the very fact of compliance with the subpoena. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966); *Curcio v. United States*, 354 U.S. 118, 125 (1957); *United States v. Blank*, 459 F.2d 383, 385 (6 Cir., 1972); *United States v. Cohen*, 388 F.2d 464, 466 (9 Cir., 1967); 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961).

If the Fifth Amendment does not protect an individual against a compelled testimonial production of commercially distributed magazines, there is no reason in principle why it should not also be deemed inapplicable to commercially distributed narcotics, stolen property and similar contraband. In that event the Fourth Amendment and the principle of probable cause become superfluous; rather than persuading the detached and neutral magistrate that grounds exist for issuance of a search warrant, the police officer need only testify before a grand jury that a suspect has contraband in his possession, after which he can be subpoenaed (on pain of contempt) to produce it.

Such an extravagant restriction of the privilege against self-incrimination would be totally at variance with the spirit of the Fifth Amendment. "To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignor its development and purpose." *Quinn v. United States*, 349 U.S. 155, 162 (1955).

Against this background the Petitioner has consistently contended that an attorney who in good faith advises his client to assert the privilege against self-incrimination cannot be adjudged in contempt of court because (1) compliance with a court order to produce potentially self-incriminatory testimonial or documentary evidence risks an irrevocable and irremediable surrender of a Fifth Amendment right, and (2) no effective judicial remedy is available to test the legality of the order before compliance with it. Thus, regardless of whether commercially distributed magazines are insulated against compulsory production by the Fifth Amendment privilege, the Petitioner's obligation under the Sixth Amendment to advise a particular course of action in the face of a constitutionally suspect court order threatening an irreparable deprivation

of a fundamental right must necessarily have transcended what, in other circumstances, would have been his duty as an officer of the Court to refrain from counseling obstruction to other court orders or decrees not entailing such spectacular disadvantages for the clients affected by them.

The totality of our experience under the Fifth and Sixth Amendments negates the suggestion that a witness confronted with the risk of involuntarily surrendering a legitimate invocation of the privilege against self-incrimination is entitled to no more than a catalog of his available alternatives. The Bill of Rights assures him of advice regarding what he *ought* to do, simply because an attorney's freedom to counsel his client to resist what in good faith is regarded as a constitutionally defective court order may very well mean the difference between an intelligent preservation of a fundamental Federal right and an ignorant, ill-considered and potentially disastrous relinquishment of it that results exclusively from the Trial Court's misconception of the law. An attorney has no professional obligation to remain inert when a Judge's hostility or insensitivity to the exercise of the Fifth Amendment privilege threatens a client's constitutional rights. In that case the primary duty is to the client, not to the Court.

Of course, it is altogether specious to argue that a lawyer must assume the risk that his good-faith estimate of the scope of the privilege may ultimately turn out to have been mistaken. Such an approach would effectively deter the transmission of precisely the sort of unrestricted, uninhibited advice that an untrained layman most desperately needs when assessing his predicament after a Trial Court has rejected his plea of the Fifth Amendment privilege.

Under our system of justice no attorney should fear being thrown into jail on a contempt judgment resulting, in the last analysis, from nothing more than an honest, good-faith answer to the inevitable question, "What would you do if you were in my place?"

The proceedings below were uniformly infected by the uncritical supposition that, according to the scale of values by which Judges and attorneys govern their professional lives, it is better that a constitutionally suspect court order be unwillingly obeyed by an ignorant and uninformed witness at the risk of irreparable constitutional injury than that a lawyer should counsel resistance to the orders of a Judge. The history of the privilege against self-incrimination does not support that assumption; on the contrary, the common law antecedents of the Fifth Amendment were deliberately designed expressly for the purpose of restraining and impeding the authority of those administrative and judicial tribunals (specifically, the High Commission and Court of Star Chamber) that attempted to grease the wheels of their official investigations by compelling the witnesses before them to provide evidence of their own guilt. The fabric of our Bill of Rights was woven on the premise that no Judge will be able to accomplish that result as long as an attorney stands in his way. That, in essence, is the reason why this judgment of contempt does not withstand even casual constitutional scrutiny.

The same considerations that prompted the Court to grant certiorari in *Fisher v. Pace*, 336 U.S. 155 (1949) and *Hickman v. Taylor*, 329 U.S. 495 (1947) necessitate review of the contempt judgment in this case.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

WILLIAM F. WALSH
1955 Richmond Avenue
Houston, Texas 77006
(713) 529-3134

STUART M. NELKIN
4635 Southwest Freeway
Houston, Texas 77027
(713) 621-9923

Counsel for the Petitioner

APPENDIX A

NO. 57,284-C

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.
(In The Matter of Contempt:
KARL A. MALEY and MICHAEL ANTHONY MANESS)

In The District Court Bell County, Texas
169th Judicial District

JUDGMENT

BE IT REMEMBERED that on the 11th day of May, 1973, at Belton, Texas, the undersigned judge, Honorable James R. Meyers, sitting by designation in the above styled and numbered cause, conducted an evidentiary hearing, in accordance with Article 1911a, Tex. Rev. Civ. States., to review an order of the Honorable J. F. Clawson, entered in open court on February 2, 1973, which order found guilty of contempt of court Karl A. Maley and Michael Anthony Maness, officers of the Court, and which order further assessed the punishment for each contemnor at 10 days confinement in the Bell County Jail and a fine of $200.00.

The Court having considered the entire record in this cause of action, it is ORDERED that the findings of guilty entered by Judge Clawson against the said Mr. Maley and Mr. Maness be, and they are hereby, affirmed; and it is further ORDERED, in lieu of the punishment

assessed by Judge Clawson, that the said Karl A. Maley be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Michael Anthony Maness be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973.

Signed September 28, 1973.

/s/ JAMES R. MEYERS
Judge Presiding

STATE OF TEXAS
COUNTY OF BELL

I, D. CARPENTER, Clerk of the District Court of Bell County, Texas, do hereby certify that the attached and foregoing is a true and correct copy of Judgment entered in Cause No. 57,284-C styled:

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.
(In The Matter of Contempt:
KARL A. MALEY and MICHAEL ANTHONY MANESS).

as same appears of record in Volume 519 on page 23 of the Civil Minutes of the 169th District Court of Bell County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT this the 1st day of October A.D. 1973.

D. CARPENTER
District Clerk, Bell County, Texas

By: /s/ B. JAMES
Deputy

NO. 57,284-C

CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ET AL.

In The District Court of Bell County, Texas
169th Judicial District

IN THE MATTER OF CONTEMPT

On this the 2nd day of February, 1973, came on to be considered the matter of the refusal of the Defendant Michael McKelva to obey the subpoena heretofore issued out of this court commanding him to bring into court certain matter listed in said subpoena:

And the Court having heard the statements of counsel and the testimony of said Defendant McKelva admitting in open Court to having willfully and knowingly refused to comply with said subpoena duces tecum and their reasons for so refusing being considered without merit, finds that the Defendant Michael McKelva and his attorneys, Karl Maley and Michael Anthony Maness are all and each of them in contempt of this Court, the Defendant for failing and refusing to obey the subpoena duces tecum issued out of this Court on the 24th day of January, 1973, and his attorneys for advising and counseling the said Defendant to disobey said subpoena; and the said Defendant and each of his said attorneys are order punished for said contempt by confinement in the Bell County Jail for a term of ten (10) days and payment of a fine of Two Hundred ($200.00) Dollars.

It is therefore ordered that the Sheriff of Bell County take into custody the said Michael McKelva, Karl Maley and Michael Anthony Maness, and confine them and each of them until they shall have each have served ten days from February 1, 1973 at 10:50 A.M. and paid their fines of Two Hundred Dollars each.

The said Karl Maley and Michael Anthony Maness having filed and presented their motion under Article 1911 RCS of the Statutes of Texas, are released on their personal recognizance pending hearing hereon in accordance with said Article.

/s/ J. F. CLAWSON
Judge, 169th Judicial District
Court of Bell County, Texas.

THE STATE OF TEXAS

To The Sheriff of Bell County—Greetings:

You are hereby commanded to receive, take into custody and confine within the jail of your County, Michael Anthony Maness, who is hereby committed to the said jail for the offense of contempt of Court arising out of the disobedience of certain orders in CAUSE No. 57,284-C The City of Temple v. Michael McKelva, Allen Boyer & T. C. McKelva et al. in the District Court of Bell County, Texas.

The said contemner shall be released from custody when all the conditions have been met and all payments made as set out in the attached exact copy of the judgment of the Court herein.

Given under my official hand and seal of said Court at Belton, Texas, this the 7th day of February, A.D., 1973.

J. F. CLAWSON
J. F. Clawson, Judge District Court
169th Judicial District,
Bell County, Texas.

APPENDIX B

NO. 4416

IN THE
COURT OF CRIMINAL APPEALS

EX PARTE

KARL A. MALEY

AND

MICHAEL ANTHONY MANESS

ORDER

On this the 11th day of October, A.D. 1973, came on to be heard the petitioner's motion for leave to file original application for writ of habeas corpus, and the court, after considering the said motion and the brief in support thereof, is of the opinion that such motion for leave to file an original application for writ of habeas corpus should be denied.

It is so ordered.

/s/ JOHN F. ONION, JR.
Presiding Judge

APPENDIX C

SUPREME COURT OF TEXAS

October 11, 1973

NO. B-4261

EX PARTE

KARL A. MALEY

AND

MICHAEL ANTHONY MANESS

ORIGINAL HABEAS CORPUS

Relators' petition for writ of habeas corpus, filed herein this day, having been duly considered in chambers, it is ordered that said petition be, and hereby is, denied.

It is further ordered that relators, Karl A. Maley and Michael Anthony Maness, pay all costs incurred and expended in this Court in the above case.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of Ex Parte Karl A. Maley and Michael Anthony Maness, No. B-4261, Habeas Corpus, as such order appears in the minutes of said Court under the date of October 11, 1973.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this the 11th day of October, 1973.

GARSON R. JACKSON, Clerk
By /s/ EUGENE CERVENKA, Deputy.

APPENDIX D

Article 527, Texas Penal Code:

* * *

"Sec. 13. The district court of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter."

Article 1911a, Revised Civil Statutes of Texas:

* * *

"Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including the authority

to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

* * *

"Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court;

* * *

"(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Such judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred."

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No. 57,284-C

THE CITY OF TEMPLE, TEXAS

v.

MICHAEL McKELVA, ALLEN BOYER
and T. C. McKELVA, et al.

In the District Court of Bell County Texas
169th Judicial District

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

2-1-73 Def. mtn. to quash subpoena heard and considered. Subpoena modified to exclude items listed in Par. 1—in all other respects motion overruled. Motion as to burden of proof taken with the case. City's mtn. to hold Def. in contempt for failure to comply with subpoena heard & considered—def. given 'til 1:00 p.m. (2 hrs.) to comply with subpoena under threat of contempt. Testimony begun. Court reconvened at 1:15 p.m. Def. Michael McKelva failed to respond to subpoena—found to be in contempt—punishment deferred until conclusion of trial—evidence concluded at 3:45, recessed to 2-2-73 at 9:00 A.M.

2-2-73 Arguments taken—findings of obscenity, injunction granted, notice of appeal. Def., attys Maness and Maley found to be in contempt. Punishment assessed against Def. Michael McKelva and his

attys, Karl Maley and Michael Anthony Maness of 10 days in Bell County Jail and a fine of $200.00 each. Attys released on personal recognizance pending hearing under Article 1911A sec. 2-C. Presiding notified. J. F. Clawson.

2-8-73 10:00 a.m.—Def. McKelva having served 7 days, credited with 3 days for good behavior, balance of sentence remitted including $200.00 fine as to him only.

* * * * *

SUBPOENA

STATE OF TEXAS
COUNTY OF BELL

TO ANY SHERIFF OR ANY CONSTABLE WITHIN THE STATE OF TEXAS, GREETING:

You are hereby commanded that you serve by delivering a copy of this subpoena to Michael McKelva, and thereby to summon said Michael McKelva, who resides at 526 Wolf, Killeen, Bell County, Texas, and he shall thereby know that he is summoned, to be and appear before the 169th District Court, to be holden in and for the County of Bell, at the courthouse thereof, in the City of Belton, on the 1st day of February, 1973, at 9:00 o'clock a.m., then and there to testify, being thereunto summoned at the instance of the plaintiff and by request of William T. Wilson, his attorney, in a certain suit now pending in our said court, the style of which is The City of Temple, Texas v. Michael McKelva, Allen Boyer, and T. C. McKelva, et al and the number, No. 57,284-C, and that he do diligently and carefully search, examine, and inquire for, and bring with him

and produce, at the time and place aforesaid, certain magazines entitled as follows: RAPTURE; HARD LOVE; PRIVATE ISSUE H; PRIVATE ISSUE F; FRENCH LUV; PRIVATE ISSUE G; SEXUAL FANTASIES; PRIVATE ISSUE E; SEX TECHNIQUES; PRIVATE ISSUE D; TEENAGE ORGIES; SEXUAL FREEDOM; PRIVATE ISSUE C; PRIVATE ISSUE B; THE SENSUOUS COUPLES; BEDPLAY; SEXWORLD; SENSUOUS STRANGERS; PRIVATE ISSUE A; FALLOS UND FICKEN; PATTERNS OF SEDUCTION; SEXUAL LIBERTY; STRANGE SEX LAWS; THE SEXUAL REVOLUTION; SEX ON CAMPUS; ENRAPT; COME PLAY WITH ME; TEENAGE SLUTS, SLUTS, SLUTS; CLIMAX; PLEASURE SEEKERS, SEX VARIATIONS PART 3; CLIMAX 210; PLEASURE SEEKERS SEX VARIATIONS; IN TIGHT: DANDY LIONS; BOY PLAY; HARD 2; POCKET POOL; THE BOY IN THE BED; TEA ROOM FOLLICS; TRICK; TAILS BEFORE MIDNIGHT; GLORY HOLE; IN THE GROOVE; HOT AND HORNY; GAY SEX GUIDE; DAVID GOES LEATHER; TODS FIRST TIME; A.W.O.L.; THE PROSTITUTE; OVERSEXED; SEX OBSESSED WOMEN; and SEXUAL INFINITY, that it may be subject to such use as may be made of it under direction of the court, and that he continue his attendance from day to day and from term to term, until discharged by the court or by the said William T. Wilson.

Herein fail not, but have you then and there before said court this writ, with your return thereon, showing how you have executed the same.

Witness Hugh Taggart, Clerk of the District Court of Bell County.

Given under my hand, at office in Belton, Texas this 24th day of January, 1973.

HUGH L. TAGGART
Clerk of the District Court of
Bell County, Texas

Issued this 24th day of January, 1973.

HUGH L. TAGGART
Clerk of the District Court of
Bell County, Texas

By: F. Adams, Deputy

RETURN

Came to hand on the 25th day of Jan., 1973, at 9 o'clock A.M. and executed in Bell County on the same day by delivering a copy hereof to said witness, Michael McKelva. Served 1-30-73 8:15 A.M.

The distance actually travelled by me in serving such process was ____ miles and my fees are $____.

LESTER GUNN
Sheriff of Bell County, Texas

By D. R. Oldham
Deputy

* * * * *

DEFENDANT'S MOTION TO QUASH SUBPOENA

Filed February 1, 1973

(Caption Omitted in Printing)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant, Michael McKelva, and moves the Court to quash the subpoena issued by the

Clerk of the Court on the 24th day of January, 1973, and served upon him upon the 30th day of January, 1973, commanding him to appear and testify in the above styled and numbered cause of action at 9:00 o'clock A.M. on the 1st day of February, 1973, for the reason that the same is unreasonable and oppressive, and further that the Plaintiff has not advanced the costs for the production of the materials therein called for to be produced, and as grounds would further show as follows:

I.

This Defendant does not have [in] his possession, and can not produce after diligent search, and he has no knowledge whatever, [of] where can be found, the following magazines: Teenage Orgies, Fallos and Ficken, Come Play With Me, Glory Hole and/or Hot and Horny.

II.

This Defendant is not the owner of, and is not entitled to the ownership of, any of the other [matters] referred to in said subpoena, the full list of which is incorporated herein by reference.

III.

This Defendant would show the Court that in any event, Defendant is privileged under the Constitution of the United States of America and the State of Texas against [appearing] and testifying or producing such materials in that the requirement of the same might tend to incriminate him. Heretofore, on January 24, 1973, this Defendant was prosecuted in the Municipal Court of Temple, Texas on charges of selling obscene material, and is still charged with possession for sale of obscene material, and

although this Defendant makes no admission herein of the character of his testimony or of the character of the materials sought to be subpoenaed, he would show that the issuance of the subpoena is merely an attempt by the Plaintiff to require production of testimony and materials in violation of his Constitutional rights and by a means which would not be otherwise be available and to force his confinement by contempt or otherwise, or bring the threat of such confinement, in order to require him to testify against himself.

IV.

The statutes of the State of Texas, and the Code of the United States of America, provide procedures for the search and seizure of materials preadjudged to be unlawful in prior adversary hearings, and the issuance of the subpoena herein is merely an attempt by the Plaintiff to circumvent all of those procedures by resort to a quasi-civil procedure, all in violation of the Constitutional rights of this Defendant.

WHEREFORE, PREMISES CONSIDERED, this Defendant respectfully prays the Court that the subpoena heretofore issued and served upon him on the 30th day of January, 1973, be in all things quashed and that he be allowed the protection afforded by his rights under the Constitution of the United States of America and the State of Texas.

Respectfully submitted,

MALEY AND FRIEDMAN
By Karl A. Maley

* * * * *

TRANSCRIPT OF HEARING ON PERMANENT INJUNCTION

[5] BE IT REMEMBERED that on the 1st day of February, 1973, the above entitled and numbe[r]ed cause, was called for a hearing on an application for permanent injunction, and the following proceedings were had:

THE COURT: Mr. Maley, I believe you have a motion to present.

MR. MALEY: Yes, sir. We have a motion to quash the subpoena that we would like to present to the Court.

THE COURT: All right, you may proceed.

MR. MALEY: If it please the Court, I would like to allow Mr. Maness to make the arguments in support of the motion, and if it is all right with you, he will proceed.

THE COURT: All right, that is fine. You may proceed, Mr. Maness.

MR. MANESS: Your Honor, we have filed with the Court a motion to quash the subpoena that was issued on behalf of the Plaintiff in this action. This subpoena was served on Mr. Michael McKelva on the 30th day of January.

Mr. Wilson and I have discussed the fact that [6] five of these 52 magazines that are named in the subpoena are not now in the possession of Mr. McKelva, and, consequently, he is unable to produce those magazines. Mr. Wilson I think will stipulate, or he has stipulated, that those five magazines are no longer involved in this pro-

ceeding. They are named and described in Paragraph 1 of the motion.

THE COURT: All right, sir. As to those that are named, if there is no objection from Mr. Wilson, the subpoena will be modified to exclude those particular publications.

MR. WILSON: We have no objections to that, Your Honor.

THE COURT: All right, it will be so modified.

MR. MANESS: If the Court, please, with regard to the remaining 47 magazines, the Court will note that in Paragraph 2 of our motion we have asserted that Mr. Michael McKelva is not the owner of the 47 magazines that are now named in the subpoena or any other of the matters referred to in the subpoena. Of course, the other 47 titles are named therein. Consequently, since he has no ownership and has no property interest in these magazines, we feel that he cannot properly be required to produce these magazines. Any party that is named in the subpoena [7] cannot be required to produce property that he does not own.

Of course, the third paragraph, I suppose, is the essence of our case here this morning, of our position here this morning. What the City of Temple has attempted to do in this case is to compel the production in a civil, or what they claim to be a civil proceeding of 47 magazines. For the record we will certainly stipulate and state to the Court now these 47 magazines do deal explicitly with acts of a sexual nature. As a consequence of this fact, we feel that it is very clear that there is a substantial pos-

sibility of self-incrimination if the Defendant were required to produce these magazines.

We feel that this is the case primarily because the Defendants have previously been prosecuted under a City of Temple ordinance and in fact has been convicted under that ordinance for the sale of seven other magazines. These seven are not named in the subpoena, but that the character of the magazines that are named in the subpoena is such that a compulsory production of these publications would entail the same possibility of self-incrimination.

It is fairly clear we believe in view of the decisions of the United States Supreme Court that the character of the proceeding in which the material is being [8] sought is not relevant. In other words, it does not matter whether we are talking about an Agency proceeding or a proceeding before the Tax Court of the United States, a proceeding before the Interstate Commerce Commission, or as in this case, a proceeding on an injunction. It is the character of the documents, or the objects, or the letters, or whatever, and in this case they are magazines, that determines whether or not a Defendant can be compelled to produce them.

In view of the fact that there is this substantial possibility of self-incrimination; in view of the fact that seven other magazines that are of the same character as the 47 magazines named in the subpoena, that they have provided the basis for past criminal prosecutions; in view of the fact that criminal prosecutions are not only a very definite possibility, they are in fact a pronounced possibility, and so there is little reasonable doubt in these circumstances that the subpoena should be quashed because in fact it seeks to compel the person named in the

subpoena to incriminate himself, and, of course, this is prohibited by the Fifth Amendment to the Constitution of the United States.

It is significant also that although the character of these proceedings would probably be characterized as civil in nature that the Court is nevertheless hearing [9] this case under the provisions of Section 13 of Article 527 of the Texas Penal Code.

Essentially our position in that regard is that despite the fact that injunction proceedings ordinarily are purely civil in nature, nevertheless in these circumstances they are quasi criminal in nature. Certainly it is correct that the City Attorney of Temple could not in a criminal prosecution order the Defendant to produce the books, magazines, or other publication that might have a tendency to incriminate him in these proceedings. We think that the same principle is applicable here. In other words, the City of Temple cannot do indirectly what it cannot do directly. To a considerable extent this seems to be the purpose of the subpoena in this case, and that is to compel the production into evidence of matters that possibly and perhaps quite probably would be used in the future as a basis for a criminal prosecution, and that is either under the City ordinance enacted by the City of Temple or under Article 527 itself. In those circumstances the City cannot simply compel the production of this material because it is self-incriminatory.

Our position would be as is stated in Paragraph 4 of our motion to quash. If the City wishes to examine these magazines or wishes to have access to them, then it may quite properly secure a search warrant to search the [10] named premises and with such search warrant particularly

describing the magazines that they wish to examine. That is the constitutional way to do it. You cannot accomplish that result by a process of indirection, and that is by issuing a subpoena, that is to issue a subpoena in a case that they say is purely a civil proceeding and then say that the material that you produce might incriminate you because the Fifth Amendment is as applicable in these kind of proceedings as it would be in a purely criminal proceeding.

Your Honor, I believe that is the essence of our motion to quash. We do have one other motion that we would like to present. Would you like to have both motions at the same time or how would you wish to do that?

THE COURT: Well, first we will hear the City on your motion to quash.

MR. WILSON: Your Honor, I would like to point out, in the same order as Mr. Maness pointed it out, that is with reference to his position on the motion.

First of all, and again for the record, I will stipulate as to Paragraph 1, and that is that he does not have those particular magazines, and we will delete those.

As to Paragraph 2, he alleges in the Defendants' motion that Mr. McKelva is not the owner, that he does not have the ownership of these matters, and that is his pleading [11] and that, of course, would be his burden of proof to show if that fact is true. If he does not care to submit testimony to that effect, then I would submit some testimony showing for the record and for the Court that the test that he does have the control and custody of these items which are the subject of the subpoena, and as such this is what we are attempting to get, and that

is the person in control or in custody of the materials that are listed on the subpoena, and not the exact ownership.

As to Section 3 of the motion, it is the City's position that this is a civil proceeding and is under the Civil Rules of Procedure and that there are no criminal sanctions and so there will be no evidence that would be incriminating under the rules, and under the jurisdiction of this Court.

Further, it is our contention that all that can be accomplished in this proceeding is a civil determination of the subject matter involved in this litigation and that there is no contention on the part of the City or any attempt on the part of the City to get any evidence for any criminal prosecution and so it would not be incriminating for that reason.

Further, Section 13 of Article 527 is a proceeding that is admittedly under Section 527 of the Penal Code, but again it does make reference, as the Court is [12] aware, to injunctive proceedings, which is civil in nature. There is no proceeding under the Rules of Criminal Procedure that provide for any injunctive proceedings.

The last point is with reference to his allegations as to a search warrant. Of course, there again I would urge that this is not a criminal proceeding and the search warrant is a method of obtaining evidence for a criminal prosecution. We are not contending that this is a criminal prosecution. It is a civil proceeding in injunctive form. This was the purpose for our subpoena. We ask the Court that the matters alleged in the subpoena be subject to being produced here in Court today.

THE COURT: Do you have anything further on this motion, Mr. Maness?

MR. MANESS: Your Honor, in the argument that has been made by the attorney for the City of Temple, I think the argument has already been made in the past so many different times and in different contexts and that it has been amply answered by the multitude of Supreme Court decisions that deal with the situation in the non-criminal proceeding.

Where the Government or the State attempts to compel the production of tangible documentary evidence, and on that we have tax cases, for instance, the United States v. Court, Polluck v. The United States, [13] and this deals with situations, and also we have instances where the Internal Revenue Service has attempted to subpoena a taxpayer's documents into Court, and, of course, that is perfectly proper in a civil tax proceeding, and there is nothing wrong in compelling the production of the taxpayer's records. However, i[f] the circumstances are such as would indicate a substantial probability that the production of those records would tend to incriminate the taxpayer, then the Supreme Court of the United States has held that regardless of the non-criminal character of the proceedings, that the material is nevertheless not subject to production because to require a taxpayer under those circumstances to produce his records would tend to incriminate him.

It is very clear that the coverage of the Fifth Amendment is not to be determined by the nature of the proceeding in which it is asserted. The Fifth Amendment applies to all proceedings, to injunctive proceedings, to administrative proceedings, and to criminal proceedings.

It applies to interrogation by Police Officers out of Court. It applies across the board. We are not talking about the context of the proceedings in which the privilege against self-incrimination is asserted. We are talking about the character of material that is sought to be taken from the person who is subject to the subpoena.

In this case a party in a civil proceeding has [14] been asked to produce and has been asked to testify as a matter of fact in this proceeding with respect to, as we have stipulated, 47 magazines, the character of which, as we have also stipulated, is such that they deal with explicit sexual activities. What is the test in those circumstances is whether there is a substantial probability in requiring the party that is served with the subpoena to produce the evidence, which evidence would entail self-incrimination, and with the production of the magazines for possible use in a criminal prosecution, and we say that this would amount to a violation of the privilege under the Fifth Amendment, and we contend that it most certainly would, and that it must.

For one thing Mr. Wilson's representation that they are not interested in a criminal prosecution, that certainly does not bind for example the County Attorney, or anyone else within this particular jurisdiction or in the geographical area, who might be interested in prosecuting such a case, and that is for possession with intent to sell or for the sale of allegedly obscene material. It does not matter, even though Mr. Wilson is correct in asserting such a representation, the representation that all they are interested in here is the production in a civil proceeding. The Supreme Court has repeatedly held that that is not the test. The test is what happens when you require the person [15] to produce the material, these

particular books, magazines, and other publications and whether there is a substantial probability that such production will tend to incriminate them. It is obvious in this case that it would, and this is particularly obvious in view of the past criminal prosecutions in the City of Temple. Given that fact, we think it is very clear under these circumstances that this subpoena must be quashed because to require anyone to produce these sort of magazines, and that is regardless of the nature of the proceeding, would violate their Fifth Amendment rights.

THE COURT: The Defendants' motion to quash, as modified to exclude the five magazines listed in Paragraph 1 of that motion, is in all other respects overruled.

* * *

[21] RECESS.

THE COURT: Gentlemen, may we have all of the witnesses sworn at this time?

(The Court duly swears a group of witnesses.)

THE COURT: You may proceed, Mr. Wilson.

MR. WILSON: Your Honor, may we approach the bench for just a moment, please?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. MALEY: Your Honor, for the record, Counsel for the City of Temple and the Defendant, the three

Defendants in the case, we wish to stipulate before the Court, with the agreement of the City, that in this case the certain named seven cases, which I will produce for the Reporter, that the Defendants herein, Michael McKelva and Allen Boyer, have been found guilty before a Municipal Court in the City of Temple for the sale of obscene matter, and that those matters, that each of those findings of guilty have been appealed to the County Court.

[22] THE COURT: Do you stipulate to that, Mr. Wilson?

MR. WILSON: We do so stipulate, yes, sir.

THE COURT: All right, the stipulation is approved and received into evidence.

Docket No. 31328; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31329; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31384; Defendant, Michael McKelva; Att: Mel Friedman; charge, sell obscene material; witnesses, Vernon McKenzie, Steve Klempa.

Docket No. 31385; Defendant, Michael McKelva; Att: Mel Friedman; charge, possession obscene material; witness, Vernon McKenzie.

Docket No. 31454; Defendant, Michael McKelva; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, James Payne.

Docket No. 31334; Defendant, Allen Boyer; Att: Mel Friedman; charge, sale obscene matter; witnesses, Vernon McKenzie, Kenneth Miller.

Docket No. 31335; Defendant, Allen Boyer; Att: Mel Friedman; charge, sale obscene matter; witnesses, [22-A] Vernon McKenzie, Kenneth Miller.

THE COURT: You may proceed, Mr. Wilson.

MR. WILSON: Your Honor, the Court calls the Defendant, Michael McKelva, to the witness stand.

MICHAEL McKELVA

was called as a witness, and having been heretofore duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q. State your name and occupation to the Court, please.

A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.

Q. And is that Mike's Newsstand at 118-A South First Street?

A. Yes, sir, it is.

Q. Mr. McKelva, were you served with a subpoena requesting you to bring certain magazines, certain titled magazines to Court today?

A. Yes, sir, I was.

Q. And do you have those with you here today?

A. Sir, under the advice of Counsel, I refuse to [23] answer on the grounds that it may tend to incriminate me.

Q. Do you recall the day when you were served with a copy of this subpoena?

A. Yes, sir, I do.

Q. And what was that day?

A. I believe that was day before yesterday.

Q. Did you at that time have in your possession the magazines listed in the subpoena?

A. Under the advice of Counsel, I plead the Fifth.

Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?

A. Under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael [24] McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court.

* * *

[28] THE COURT: Counsel, what would be a reasonable time within which to allow the witness to comply with the subpoena?

MR. MALEY: Do you mean a reasonable time in order to determine what costs may be involved, Your Honor?

THE COURT: No, sir. I mean a reasonable time within which to permit the witness to comply with the subpoena.

MR. MALEY: Your Honor, it is the position of the Defendant in this case, and it will be the position of this witness, too, who is a Defendant in the case, that it would make no difference what time was involved, that the matter would still be a matter of incriminating himself, of producing incriminating evidence [29] against this Defendant, and evidence which could later be used against him. The Defendant at any time, whether it be a reasonable time of 10 days, three days, or two hours, that the subpoena would still require the production of evidence which would tend to incriminate this Defendant.

THE COURT: I think that under the rule the Court should not entertain a motion to punish a witness for contempt until such time as that witness has had a reasonable opportunity to comply with the subpoena. What I would like now is to give the witness a reasonable time within which to comply with the subpoena before I consider the City's motion to punish him for contempt. Now, if you are saying that he needs no time, then we will proceed with the motion, but if he needs time, then the Court will try to give him a reasonable time.

MR. MALEY: Your Honor, I am not in a position to state to the Court what would be a reasonable time within which to produce it. I think this would be a mat-

ter that would be within the sound discretion of the Court, as to what a reasonable time would be, and that is in order to comply with the subpoena that was issued out by the District Clerk.

I am not in a position to advise the Court on that or to state on behalf of these Defendants what a [30] reasonable time would be, Your Honor.

THE COURT: All right. The Court finds that a tender has been made of the reasonable fees, and that the witness has declined to accept any fees. The witness is given until 1:00 o'clock this afternoon to comply with the subpoena. He is instructed to be back here at 1:00 o'clock this afternoon and in compliance with the subpoena to have the materials listed in the subpoena duces tecum, and failing which the Court will then entertain the City's motion to hold the witness in contempt.

MR. MALEY: Please note our exceptions to the ruling of the Court.

THE COURT: All right, you may step down.

(Witness excused.)

* * *

[76] THE COURT: Before the Court recesses until 1:30 P.M., I want to make it clear that Mr. McKelva was given until 1:00 o'clock today to respond to the subpoena.

MR. MALEY: Yes, sir. The Defense understood [77] the instruction.

THE COURT: All right, we will recess until 1:30.

RECESS.

THE COURT: Are you ready to proceed, gentlemen?

MR. WILSON: Yes, sir, Your Honor.

MR. MALEY: The Defendants are ready, Your Honor.

THE COURT: All right, you may proceed, Mr. Wilson.

MR. WILSON: Your Honor, we will recall the Defendant, Michael McKelva, to the witness stand.

MICHAEL McKELVA

(Recalled.)

DIRECT EXAMINATION

By Mr Wilson:

Q. You are the same Michael McKelva who was testifying earlier here in Court?

A. Yes, sir, I am.

Q. And are you further the same Michael McKelva [78] who was instructed earlier by the Court on this day, the 1st day of February, 1972, in open Court to bring with you to Court at 1:00 o'clock certain magazines listed in the subpoena duces tecum with which you testified that you were served?

A. No, sir. It was 1973.

Q. I am sorry, you did not answer my question. Are you the same person?

A. No, sir, it was in 1973.

THE COURT: Apparently you are saying 1972, Mr. Wilson, instead of 1973. Try your question again.

Q. (By MR. WILSON) All right, 1973, and I'm sorry.
A. Yes, sir.
Q. I am sorry, but I just haven't got over the change of the year yet.
A. Yes, sir.
Q. Do you have those magazines for the Court today?
A. No, sir.
Q. You do not?
A. No, sir.
Q. Have you attempted to secure those magazines?
A. No, sir.
[79] Q. Have you made any effort at all to obtain those magazines?
A. No, sir.
Q. Were you fully aware at the time of the Court's instructions to bring certain magazines before the Court?
A. Yes, sir.
Q. Is it your testimony then that you are willfully refusing to bring those magazines pursuant to the request made to you by the Court?
A. Yes, sir.

* * *

[80] THE COURT: Do you have any questions that you want to ask this witness at this time?

MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.

THE COURT: All right.

MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?

[81] A. Yes, sir, I do.

MR. MANESS: That is all I have, Your Honor.

THE COURT: You may stand down, Mr. McKelva.

(Witness excused.)

MR. WILSON: Your Honor, at this time I reurge my motion for the Court to find the Defendant in contempt of Court because of his failure to comply with the subpoena duces tecum.

* * *

[82] THE COURT: The Court finds the Defendant Michael McKelva to be in contempt of Court and will treat the failure of the Defendant to respond to the subpoena as an admission that the publications named in the subpoena are obscene as alleged by the City and will defer any assessment of punishment until the conclusion of this trial.

You may proceed, Mr. Wilson.

MR. MANESS: Pardon me, Your Honor, but may we except to the Court's ruling?

THE COURT: Yes, sir.

MR. MANESS: We would also point out to the Court,

and again the Court has ruled, and we do not by any means want to be argumentative, but precisely this situation has arisen before in the case styled Hunt v. Rodriguez, and this was before the United States Court for the Western District of Texas. In this case the District Judge, like Your Honor, determined that the failure [83] of the Defendant to produce the publications in question constituted something like a presumption in effect that the materials that they failed to produce were obscene.

On appeal the U. S. Circuit Court of Appeals explicitly disclaimed that theory. They pointed out that it amounted to nothing less than penalizing a party to the lawsuit for exercising what they believed to be a Federal constitutional right. To that extent, we would certainly except to any decision on the part of the Court at this time to hold that the 47 magazines named in the subpoena are obscene simply because the Defendant did not produce them in Court.

THE COURT: I am not making any finding—

MR. MANESS: Yes, sir, I understand.

THE COURT: But the fact that Counsel himself admitted this morning in open Court that these materials were of the same nature as those produced and offered in evidence this morning, and this coupled with the fact that you said that the reason that the Defendant would not bring them into Court, and that coupled with the fact that he has now declined to do so, I think justifies the Court in treating that as an admission, and that the matters are of the same nature as these that are here in Court, and so the Court is taking it as an admission to that extent.

[84] MR. MANESS: Yes, sir, I understand the Court's ruling, sir, and I would only point out that our position in the matter is that the 47 magazines must be judged individually and according to their content, and we do not by any means contend that simply because the other seven magazines were adjudicated obscene that these 47 magazines are also obscene. In fact, our contention is directly to the contrary.

* * *

[119] CROSS EXAMINATION

BY MR. MALEY:

Q. Mr. McKenzie, you never observed the sale of any of these materials to anyone, did you?

A. No, I did not.

Q. If a minor came into the possession of it, or any similar material, or whatever that question was, you never did observe how a minor obtained that material, did you?

A. No, sir, I did not.

Q. You are not then testifying that these Defendants at any time sold that material to a minor, are you?

A. No, sir, I am not.

Q. These items that are contained on the list that has been marked Exhibit C-8, did you at any time examine the contents of these?

[120] A. No, not the contents.

Q. All right, you never opened the cover or saw what was on the inside of these magazines?

A. No, I did not.

Q. Then for all you know they could have been filled with printed material, just writing or printed material, with the pictures just on the front and the back?

A. Yes.

Q. You could not testify otherwise, could you?

A. I could not testify either way.

Q. You testified as to what appeared on the outside of some of these materials was similar in nature to what appeared on the outside of some of the other matters. If I were to ask you questions concerning specific issues, could you tell me what that issue showed?

A. No, I could not.

Q. Then it is correct, is it not, that you could not describe to the Court what is on the outside of each of these magazines?

A. I could describe that on most of these magazines the same type of little white coverings were on them.

Q. All right, but as to what was depicted on the exterior of the magazine, you could not testify as to what was on the exterior of the magazines, could you?

A. No, sir, I could not other than that they were [121] similar to these.

Q. But you could not testify as to the specifics of the similarity, could you?

A. No, I could not.

* * *

[149] AND BE IT REMEMBERED FURTHER that on the 2nd day of February, 1973, with all parties being present, the hearing of the above entitled and numbered cause, was continued, and the following proceedings were had:

THE COURT: Counsel, does either side have anything further that they want to put in evidence?

MR. WILSON: No, sir, the Plaintiff does not.

MR. MALEY: No, Your Honor, the Defendant does not.

THE COURT: The Court will recall the Defendant Michael McKelva to the witness stand.

MICHAEL McKELVA
(Recalled)

THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed [150] to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would.

MR. MANESS: Thank you, sir, and that is all.

THE COURT: Do you have any questions, Mr. Wilson?

MR. WILSON: No questions, Your Honor.

THE COURT: You may step down, Mr. McKelva.

(Witness excused.)

[151] THE COURT: The Court will now hear argument and authorities, if Counsel cares to present them.

(Argument of Counsel.)

[152] RECESS

THE COURT: The Court will come to order.

This Court finds that the exhibits that have been introduced into evidence, the seven specific titles, and I believe there were seven, and is that correct, Mr. Wilson?

MR. WILSON: That is correct.

THE COURT: The Court finds that these seven exhibits are obscene as that term is defined under the State law as well as under the City ordinance.

The Court also finds that by admission of counsel the forty-seven named publications in the subpoena duces tecum are also obscene as that term is defined by the State law and the City ordinance.

The Court is enjoining the exhibiting, the displaying, the selling and the offering to sell of the publications that

have been introduced into evidence and the forty-seven that are named in the subpoena duces tecum.

The third section of the injunction will be any other publication that meets the definition of obscenity as contained in the State law, Article 527.

The Court is taking judicial notice of the fact that the City of Temple is a home-ruled city and also of the similarity of Article 527 of the Penal Code and the [153] City ordinance in this case.

The Court is finding not only Mr. Michael McKelva in contempt of this Court but is also finding Mr. Maley and Mr. Maness as his attorneys guilty of contempt of court.

In each of these cases the Court is fixing the punishment for this contempt at ten days confinement in the Bell County Jail and a fine of two hundred dollars.

Is there a Deputy Sheriff here?

SHERIFF: Yes, sir, I am here.

MR. WILSON: Your Honor, may I bring one point up, please?

THE COURT: Yes, sir.

MR. WILSON: As to the injunction under Article 527, is it further the order of this Court that these magazines be seized?

THE COURT: The Article does not provide for the seizure of the magazines. It provides for the delivery of those magazines to the Sheriff. The order of the Court will include a provision for the Defendant to deliver those

publications to the Sheriff for destruction as is provided for by Article 527.

MR. WILSON: Thank you, sir.

MR. MALEY: Your Honor, if we may be heard on one item here?

THE COURT: Yes, sir.

[154] MR. MALEY: First, of course, the Defendant excepts to the ruling of the Court and gives notice of appeal.

THE COURT: Yes, sir.

MR. MALEY: As far as the matter in connection with the granting of the inju[n]ction, the Defendant would request the Court to set and to allow, and we can file the formal papers today in that regard, for a supersed[e]as bond on that matter pending appeal. We request the Court to consider the amount necessary on the supersed[e]as bond on the action on the injunction.

We would further like to point out to the Court that if there is any contempt to be adjudged against counsel for the Defendant in this matter, that any instructions that were made to the Defendant in this case and particularly to the Defendant Michael McKelva, that any instructions made in that nature were instructions made by counsel to that Defendant in connection with the delivery of these materials, that there is no evidence before the Court to show that such instructions were made in the presence of the Court, and we say if we have any contempt in this matter, and we say if any, it is not that we

were intending any contempt of this Court, but that any contempt would be a matter made outside of the Court, and counsel for the Defense should be entitled, if there is any citation [155] for contempt, to a reasonable time and to be cited to appear and show cause as to why they should not be held in contempt, and that we should be allowed a reasonable time to prepare a defense in that matter and then to appear and show cause.

THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find Counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frust[r]ated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.

This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.

I have found you in contempt because you have usurped the authority of this Court.

You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion and you will be rel[e]ased on bond and this matter will be set for hearing before another Judge, who will be appointed by the Administrative Judge of this District.

[156] MR. MANESS: Your Honor, may I be heard in my own behalf on one point?

THE COURT: Yes, sir.

MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where Counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather what we have is where there is a philosophical difference between Counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.

THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.

This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.

[157] MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention or our purpose to offend the Court, and in that respect we apologize.

THE COURT: Is there anything further from either one of you?

MR. MALEY: No, sir, Your Honor. May we have a short period or a reasonable time in order to prepare our motion?

THE COURT: You may have an opportunity to prepare your motion, yes.

MR. MALEY: Thank you, Your Honor.

THE COURT: And you may have access to my library if you desire.

MR. MALEY: Thank you, Your Honor.

THE COURT: That is all.

* * *

169th District Court

Bell County, Texas

COMMITMENT

THE STATE OF TEXAS

To The Sheriff of Bell County, Texas: Greeting:

The court having fully completed the examination of this cause, it is considered that the evidence is sufficient to find the defendant Michael McKelva, guilty of contempt of the 169th Dist. Court of Bell County, Texas, for the offense of failure to comply with subpoena duces tecum & court order and for said offense it is ordered by the court that the said defendant be confined in Bell County Jail for 10 days & pay a fine of 200.00 Dollars.

Witness my official signature at Belton, Texas, this 2nd day of Feb., 1973.

J. F. CLAWSON, Judge
169th Dist. Ct.
Bell County, Texas

* * *

NOTATION REGARDING JUDGMENT OF CONTEMPT AND ORDER OF COMMITMENT

The formal written judgment of contempt entered by the Court below against Michael McKelva, Karl A. Maley and Michael Anthony Maness on February 6, 1973, together with the formal written order of commitment entered against Michael Anthony Maness on February 7, 1973, is reproduced in Appendix A of the petition for certiorari at pages 30-32.

* * *

TRANSCRIPT OF THE CONTEMPT HEARING

[2] BE IT REMEMBERED that on the 11th day of May, 1973, the above entitled and numbered cause came on regularly for a hearing on contempt motions filed by the Court against the Honorable Karl A. Maley and Honorable Michael A. Maness, and the Honorable James R. Meyers, of Austin, Texas, sitting as Special Judge; all parties being present, the following proceedings were had:

THE COURT: I call Cause No. 57,284-C in the matter of the contempt in an action styled The City of Temple v. Michael McKelva, et al.

MR. DIBRELL: Your Honor, the Attorney General's office was requested to appear in this proceeding by the Presiding Judge of the Administrative District, Judge Herman Jones. The actual capacity in which we make our appearance here I am not absolutely clear on, [3] but I would assume we would be in the position of representing the Court or upholding the contempt as found by Judge Clawson, who presided over this Court in the actual matters in which the contempt was found.

In that position we are here at the request of the Presiding Judge and we are ready to proceed.

THE COURT: All right, sir. Mr. House?

MR. HOUSE: Your Honor, in truth and reality, I believe this contempt is a separate proceeding since Mr. McKelva has already been found in contempt with no right of appeal, and this is concerning Mr. Maley and Mr. Maness.

THE COURT: Yes, that is the contempt that I meant. It is in this same action. Now, I would like to hear from you, if you want to be heard from, on how you wish to proceed.

I think that the record does reflect—and I have looked at it—that there was a contempt found and a sentence ordered against both Mr. Maness and Mr. Maley. They had the right and they exercised that right to be tried by another Judge on the guilt or innocence of that contempt.

MR. HOUSE: Yes, sir.

THE COURT: And I take it that is what we are here now on.

[4] MR. HOUSE: That is correct, Your Honor.

THE COURT: All right, go ahead.

MR. HOUSE: At this stage of the proceeding I believe it is the burden of proving it on the moving party rather than against us to show that we are not in contempt.

MR. DIBRELL: Your Honor, in that connection, we are willing to assume that burden.

THE COURT: All right, sir.

MR. DIBRELL: I think that Article 1911 does indicate that your position in presiding over this particular matter is to find either guilty or innocent, so I will say that I will be willing to assume that burden and I think that is perfectly proper.

THE COURT: I think that is right, Counsel.

MR. DIBRELL: But in that connection, Your Honor, I would like to point out to the Court that it would be my view, and I will stand corrected if the Court views it in a different way, that the record for review would be of course what actually occurred and that was present before Judge Clawson when he was trying the matter on which he ruled the contempt.

I cannot see where it would open it up for any additional testimony or evidence in the matter. It would

still be a matter of you making an independent [5] determination on the basis of what record was before Judge Clawson at the time of the contempt.

THE COURT: What is your view?

MR. HOUSE: Your Honor, I would submit that I agree completely with the gentleman.

THE COURT: Did you say that you agreed or disagreed?

MR. HOUSE: I agree.

THE COURT: That certainly makes it easier.

* * *

[21] MR. DIBRELL: * * *

I think the question is actually whether Judge Clawson erred in holding the witness Michael McKelva in contempt of Court for refusing to obey the subpoena duces tecum. Of course, quite obviously if Judge Clawson did not have the power to hold McKelva in contempt, then he could not under the state of the record hold his counsel in contempt because their contempt is based upon the question of actually advising the witness not to fulfill the lawful order of the Court.

* * *

[50] THE COURT: I will be very candid with you. [51] I am to this point, I think the record does support a finding beyond a reasonable doubt that Mr. McKelva

was advised not to bring the materials. I am dubious that materials displayed for public sale are Fifth Amendment protected, but I think it is a very close point. I really want to read that case as being at least one case that apparently is directly in point.

MR. HOUSE: Your Honor, at this time, I would like to submit what I think is a rather logical extension of the problem, if we assume, argumento, that the Defendants Mr. Maley and Mr. Maness—

THE COURT: They are the Respondents really, I think.

MR. HOUSE: All right, the Respondents, and if they did in fact advise him not to bring the films, but there is a definite distinction between advising him not to bring the films, and I am sorry, I don't mean the films, but not to bring the books, but there is a definite distinction between that advice and instructing him not to, which the record does not reflect.

Now, there are two things which I would like to point out concerning this. Of course, we deny that this happened, based upon the record, and we assert in fact that it did not happen, and only that he was advised as to his Fifth Amendment privilege, but if you are saying [52] argumento that they did do so, then it must go, and particularly as was pointed out when the attorneys have a definite bona fide disput as to whether or not the subpoena was lawful and—

THE COURT: Let me read you though, and the question was, did your disobedience to this subpoena, is it your own decision, or is it on the advice of Counsel, and

if so, what Counsel? The answer was, it was on the advice of Counsel, and it was Mr. Friedman, Mr. Maness and Mr. Maley. Now, the question is did you disobey this subpoena on your own decision and it wasn't on your own decision after the advice of Counsel, it was either on your decision or on the advice of Counsel.

MR. HOUSE: What was the advice, Your Honor?

THE COURT: Well, the question is, did you base your disobedience to this subpoena on your own, or did you base it on the advice of Counsel? Now, that is read by me to say, my Counsel advised me to disobey the subpoena.

MR. HOUSE: Well, Your Honor, I would respectfully submit, No. 1, advice of Counsel cannot be less of what would happen if you did produce it than what would happen to you if you didn't produce, and then the client may just take it upon himself to say that that was the advice of Counsel.

THE COURT: Yes, but that is not the way the [53] question is phrased.

MR. HOUSE: I think, Your Honor, if you will read the same page a little further and where Mr. Maness asked him the question in specific point, would you have produced the books if we had told you that this would not endanger your Fifth Amendment privilege? The answer was, yes, and that clears it up. Plus the fact, even if you read the record as to the point that this be beyond a reasonable doubt, and since this is a criminal proceeding, I assume that that is the standard of proof that you are going on, is that correct?

THE COURT: Yes, sir. However, the only evidence really is this one page.

* * *

[56] THE COURT: Let me get you to do this, and I do not like to do this, but quite obviously if I hold the Respondents here in contempt I am going to permit bond for the purpose of making an application for a writ of habeas corpus, but I want to see and I want a chance to read the Louisiana case and any other case that is directly in point as you say it is.

* * *

[64] THE COURT: Yes. It is not my purpose here, if I find them in contempt to have them jailed until you can file a writ of habeas corpus. We have to test it in some manner other than that.

MR. HOUSE: Yes, Your Honor, and I appreciate that.

THE COURT: Yes, and I imagine your clients do more.

* * *

NOTATION REGARDING SECOND JUDGMENT OF CONTEMPT

The second formal written judgment entered by the Respondent against Karl A. Maley and Michael Anthony Maness on October 1, 1973 is reproduced in Appendix A of the petition for certiorari at pages 27-29.

* * *

NOTATION REGARDING ORDER OF COURT OF CRIMINAL APPEALS OF TEXAS

The order of the Court of Criminal Appeals of Texas denying the Petitioner's motion for leave to file an original application for the writ of habeas corpus on October 11, 1973 is reproduced in Appendix B of the petition for certiorari at page 33.

* * *

NOTATION REGARDING ORDER OF SUPREME COURT OF TEXAS

The order of the Supreme Court of Texas denying the Petitioner's original application for the writ of habeas corpus is reproduced in Appendix C of the petition for certiorari at page 34.

* * *

ORDER CONTINUING PERSONAL RECOGNIZANCE BONDS

(Filed October 12, 1973)

(Caption and Jurat Omitted in Printing)

It having been made known to the Court that KARL A. MALEY and MICHAEL ANTHONY MANESS, Respondents in the above styled and numbered cause, have this day been denied the writ of habeas corpus by both the Court of Criminal Appeals of Texas and the Supreme Court of Texas, and it being further represented to the undersigned Judge by Respondents that they will seek further review of the judgment of contempt previously entered against them in this cause, Mr. Maley by application for the writ of habeas corpus to the United States

District Court for the Western District of Texas, Mr. Maness by petition for the writ of certiorari to the Supreme Court of the United States, and it further appearing to the Court that the personal recognizance bonds previously executed by Respondents as officers of the Court in accordance with Article 1911a, V.A.T.S., should remain in effect pending final disposition of the proceedings in those Courts,

IT IS ACCORDINGLY ORDERED that Respondents KARL A. MALEY and MICHAEL ANTHONY MANESS shall remain enlarged on the personal recognizance bonds previously executed by them on February 2, 1973 in Cause No. 57,284-C before the 169th Judicial District Court of Bell County, Texas, until 12 o'clock noon on October 26, 1973.

IT IS FURTHER ORDERED that if an application for a Federal writ of habeas corpus or a petition for writ of certiorari is filed on behalf of either Respondent before 12 o'clock noon on October 26, 1973, the aforesaid personal recognizance bond of such Respondent shall remain in force and such Respondent shall remain enlarged on such bond until the final disposition of such application for the writ of habeas corpus or petition for writ of certiorari.

IT IS FURTHER ORDERED that no attachment or other execution shall issue on the judgment of contempt against Respondents until the final disposition of any such application for the writ of habeas corpus or petition for certiorari.

JAMES R. MEYERS
Judge Presiding

* * *

ORDER CONTINUING PERSONAL RECOGNIZANCE BONDS

(Filed October 25, 1973)

(Caption and Jurat Omitted in Printing)

It having been made known to the Court that Karl A. Maley and Michael Anthony Maness, Respondents in the above styled and numbered cause, have each sought further review of the judgment of contempt entered against them on September 28, 1973, and it further appearing to the Court that the personal recognizance bonds previously executed by Respondents as officers of the Court in accordance with Article 1911a of the Revised Civil Statutes of Texas should be continued in effect pending the final disposition of the proceedings initiated by the Respondents,

IT IS ACCORDINGLY ORDERED that Respondent Karl A. Maley shall remain enlarged on his personal recognizance bond until the final disposition of his application for the writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, including any appeal therefrom to the United States Court of Appeals for the Fifth Circuit.

IT IS FURTHER ORDERED that Respondent Michael Anthony Maness shall remain enlarged on his personal recognizance bond until the final disposition of his petition for the writ of certiorari in the Supreme Court of the United States.

IT IS FURTHER ORDERED that no writ of attachment or other execution shall issue on the judgment of contempt against either Respondent until final disposition of his application for the writ of habeas corpus or petition for the writ of certiorari.

IT IS FURTHER ORDERED that if either of the foregoing proceedings involving Mr. Maley's application for the writ of habeas corpus or Mr. Maness' petition for the writ of certiorari should terminate in a final judgment or order having the effect of upholding the judgment of contempt against such Respondent, and if at that time the $500 fine against such Respondent shall remain unpaid, a writ of attachment shall then issue against such Respondent, ordering him to surrender himself to the custody of the Sheriff of Bell County, Texas, to remain under confinement in the Bell County Jail until such fine has been paid.

SO ORDERED on this 25th day of October, 1973.

JAMES R. MEYERS
Judge Presiding

Supreme Court, U. S.
FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

• • •

NO. 73-689

• • •

MICHAEL ANTHONY MANESS,

Petitioner

VS.

THE HONORABLE JAMES R. MEYERS,

Respondent

• • •

On Petition for a Writ of Certiorari to the
169th Judicial District Court of
Bell County, Texas

• • •

BRIEF FOR RESPONDENT IN OPPOSITION

• • •

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-689

MICHAEL ANTHONY MANESS,
Petitioner

V.

THE HONORABLE JAMES R. MEYERS,
Respondent

On Petition for a Writ of Certiorari to the
169th Judicial District Court of
Bell County, Texas

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the 169th Judicial District Court, Bell County, Texas, finding Petitioner guilty of contempt was

entered on Sept. 28, 1973. Said judgment was not reported, but a copy is attached to the Petition herein.

JURISDICTION

As noted above, this Petition was filed on Oct. 24, 1973, and so is timely filed. However, Respondent disputes Petitioner's contention that any rights guaranteed by the United States Constitution were denied Petitioner in this case.

QUESTION PRESENTED

Respondent disagrees with the composition of the questions which Petitioner asserts to be presented in these certiorari proceedings. Respondent feels that the following question is presented by the facts and circumstances of this cause:

Whether an attorney, who has once advised his client to refuse to obey a subpoena duces tecum on the grounds that obedience of such subpoena would violate the client's privilege against self-incrimination, can then, after the Court has again ordered the client to produce the records sought by the subpoena, advise the client to disobey the Court's direct, in-court order and escape contempt proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the Fifth, Sixth, Ninth, and Fourteenth Amendments to the United States Constitution are involved, as well as the Texas Obscenity Statute, Art. 527 of the Texas Penal Code, and the Contempt Statute of Texas, Art. 1911a of the Revised Civil Statutes

of Texas.

STATEMENT OF THE CASE

The judgment for contempt grew out of civil injunction proceedings filed in the 169th Judicial District Court of Bell County wherein the State of Texas sought to enjoin the sale of certain named magazines, the State alleging that such magazines were obscene. In said proceeding, one Michael McKelva was subpoenaed by the State of Texas, the subpoena ordering him to appear in court with some 47 named magazines. McKelva declined to produce the magazines asserting that they might be obscene and that their production would tend to incriminate him. McKelva further said that he was acting according to the advice given him by Petitioner. The Court, Judge Clawson sitting at that time, recessed the Court and ordered the Petitioner to appear within a given time and produce the magazines sought by virtue of the subpoena. When the Court reconvened, McKelva again did not produce the magazines, asserting that he would not do so and further advising the court that he was acting on the advice of counsel, Petitioner herein. Judge Clawson found McKelva, Petitioner and another counsel for McKelva guilty of contempt.

Pursuant to Article 1911a, Vernon's Texas Civil Statutes, the contempt against Petitioner, who is an attorney, must be reviewed by another district judge. This was done by the Honorable James R. Meyers, Respondent herein, who entered the judgment of Sept. 28, 1973, affirming Judge Clawson's initial judgment of contempt and setting the $500 fine. It should be noted that Judge Meyers found as a fact that Petitioner had advised McKelva not to obey the second order of Judge Clawson ordering McKelva to

produce the magazines as called for by the subpoena.

ARGUMENT AND AUTHORITIES

The Judgment of Contempt Which Held Petitioner in Contempt for Advising his Client McKelva to Disobey the State District Court's Second Order to McKelva to Produce the Magazines Sought by Subpoena Duces Tecum, was a Proper Exercise of the Court's Judicial Powers and In No Way Violates Any Constitutional Requirement or Injunction.

It is important to keep this case in perspective. McKelva was ordered to produce some 47 magazines by subpoena duces tecum at a State hearing to enjoin the sale of obscene materials. It was claimed that the magazines were obscene by the State; the Defense claimed that such magazines might be interpreted as being obscene and were therefore self-incriminatory. Accordingly, Petitioner advised McKelva not to produce said magazines under the subpoena duces tecum and when McKelva appeared at the State District Court, he so advised the Court, noting that he was claiming his privilege against self-incrimination on the advice of his counsel. At this time, Petitioner, as counsel for McKelva, did what an attorney should do in representing his client, but it should be remembered that it was not this disobedience of the subpoena that is the subject of the contempt.

After McKelva failed to produce the magazines pursuant to subpoena and advised the Court that he was doing so on the advice of counsel, the Court then ordered him directly, in open court, to produce the magazines and adjourned Court in order to permit McKelva to comply with the Court's order. When Court reconvened, McKelva again

refused to produce the magazines pursuant to the Court's direct order, again acting on the advice of counsel to disobey this second, direct order to produce the magazines. It was this second disobedience of the Court's order that produced the contempt citation against McKelva and caused the Court to hold Petitioner in contempt for advising this second disobedience.

The underlying thrust of Petitioner's contention before this Court is that the first order of the Court, the subpoena duces tecum for the 47 named publications, and the further order of the Court requiring McKelva to produce the named publications were illegal orders since the production of the said magazines pursuant to either the subpoena or the judge's direct order would tend to incriminate McKelva. Accordingly it is argued that, McKelva should be free to disobey the Court's orders and his attorneys, including Petitioner, should be free to advise McKelva to disobey the subpoena and the judge's later order.

This contention is without merit. It should first be noticed that the initial proceeding was a civil proceeding designed to enjoin the sale of the named magazines. In this connection, it is abundantly clear that the magazines had been displayed for sale at the newsstand operated by McKelva. Accordingly, the magazines cannot be considered the private books and papers of McKelva and so the magazines can be in no way equated with the private books-and-papers, self-incrimination principal. See *Katz v. United States*, 389 U.S. 347 (1967); *Lewis v. United States*, 385 U.S. 206 (1966). See also *Anderson v. Coulter*, 499 P.2d 103 (Ariz.Sup.Ct. 1972).

It should further be observed that even in criminal cases,

certain types of evidence of a defendant can be the subject of compulsory production, for example, voice samples, handwriting exemplars, and blood specimens. See *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Schmerber v. California*, 384 U.S. 757 (1966).

The apparent core of Petitioner's argument is that the mere compelling of him to bring anything into the courtroom which might later be used to convict him in a criminal case violates the privilege against self-incrimination. However, this is not a sound and valid argument because, if adopted, the contention could lead to the abolition of all criminal trials. The requirement that a defendant who is on bond must appear in Court at his criminal trial can be said to violate his privilege against self-incrimination (as can a sheriff's or marshal's forced transfer of the prisoner from jail to the courtroom). Requiring the defendant to appear in the courtroom for trial is, under Petitioner's argument, violative of the self-incrimination privilege since eye witnesses to a robbery can point to the defendant as the perpetrator of the crime. This identification would be impossible unless the defendant were compelled to appear in Court. This argument, though absurd, points up the weakness of Petitioner's reasoning that merely requiring him to produce named magazines violates his privilege against self-incrimination.

Finally, as noted earlier, a crucial question in the state proceeding was whether Judge Clawson's orders to produce the 47 magazines were legal or not. A valid order is necessary under Texas law since a person cannot be guilty of contempt if a Court requires obedience to an illegal order. The requirement of a valid order to support a contempt conviction is an unusual facet of the Texas

jurisdiction. In most jurisdictions, including the federal courts, the order disobeyed does not have to be valid and legal to support a judgment of contempt. This rationale is reached because the courts must continue to be the referee of proceedings before them and cannot permit the parties and lawyers to make judicial decisions contrary to the judgment of the Court. Walker v. City of Birmingham, 388 U.S. 307 (1967); Howat v. Kansas; 258 U.S. 180 (1922).

Accordingly, whether or not the orders of Judge Clawson were valid and legal and so binding under the law of Texas does not give rise to a federal question because, under federal law, the invalidity of a judicial order does not vitiate a contempt judgment. Therefore this Court should find against Petitioner because no viable federal question is present to provide a basis for review by certiorari. (Respondent advances the above premise arguendo since Respondent is strongly of the opinion that Judge Clawson's orders to McKelva to produce the 47 magazines were valid orders under any jurisdiction of this country.)

CONCLUSION

For the reasons advanced above, Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, Attorney for Respondent, certify that copies of the above and foregoing Brief of Respondent in Opposition have been served by placing same in the United States Mail, postage prepaid, on this the _____ day of December, 1973, to the following addresses: William F. Walsh, 1955 Richmond Ave., Houston, Texas 77006; and Stuart M. Nelkin, Bernstein & Nelkin, 720 Executive Plaza West, 4635 Southwest Freeway, Houston, Texas 77027.

LONNY F. ZWIENER
Assistant Attorney General

Supreme Court, U. S.
FILED
JUN 16 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

On Writ Of Certiorari To The 169th Judicial District Court Of Bell County, Texas

BRIEF FOR THE PETITIONER

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June 1974

Appeal Printing Co., Inc., Austin, Texas, No. 11-68-74, [illegible], Texas 78701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner,*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent.*

On Writ Of Certiorari To The 169th Judicial District Court Of Bell County, Texas

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BRIEF FOR THE PETITIONER

THE OPINION BELOW

No formal written opinion was filed by the Court below in support of the judgment of criminal contempt entered against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of the petition for certiorari at pages 27-29. The orders of the Court of Criminal Appeals of Texas and the Supreme Court of Texas denying the Petitioner's original applications for habeas corpus relief on October 11, 1973 are

reproduced in Appendix B and Appendix C of the petition for certiorari at pages 33 and 34. The filing of the petition on October 24, 1973 was timely under Rule 22(1) of the Court.

Because the contempt judgment entered by the Respondent against the Petitioner is not subject to review in any higher Texas court, the case is within the Court's certiorari jurisdiction conferred by 28 U.S.C. § 1257(3). *Stanford v. Texas*, 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville*, 362 U.S. 199, 202-03 (1960).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims implicate the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights and the Fourteenth Amendment guarantee of due process of law.

The relevant provisions of the Constitution of the United States, the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) and an obscenity ordinance enacted by the City of Temple, Texas on October 19, 1972, are reproduced in Appendix A of this brief at pages 61-68.

STATEMENT OF THE CASE

On February 1, 1973 Petitioner Michael Anthony Maness, a licensed attorney admitted to practice before the courts of the State of Texas and this Court, appeared as one of the counsel of record for the Defendants in the trial of Cause Number 57,284-C, *The City of Temple, Texas v. Michael McKelva, Allen Boyer and T. C. McKelva, et al.*, an action then pending before the 169th Judicial District Court of Bell County, Texas, the Honorable J. F. Clawson presiding. In this suit the City of Temple, as Plaintiff, sought a permanent injunction under section 13 of Article 527 of the Texas Penal Code[1] to

1. The comprehensive revision and recodification of the Texas Penal Code which became effective on January 1, 1974 did not carry forward section 13 or any equivalent provision authorizing an injunction against the sale, display or distribution of obscene material. The State Bar Revision Committee's comment explaining this omission characterized the injunctive remedy as "awkward." Committee Comment (§ 43.23), *Final Draft of a Proposed Revision of the Texas Penal Code* (October, 1970).

restrain the Defendants from selling allegedly obscene matter in alleged violation of Article 527 and the criminal provisions of a virtually identical municipal obscenity ordinance under which Defendants Michael McKelva and Allen Boyer had previously been tried and convicted on January 24, 1973 (A. 15-17).

On January 30, 1973, two days before the trial of the City's application for a permanent injunction, Michael McKelva was served with a subpoena duces tecum (A. 2-4), directing him to produce fifty-two named magazines before the 169th Judicial District Court at 9:00 a.m. on February 1, 1973 and to appear before the Court at that time to give testimony as a witness at the trial. The subpoena identified the magazines only by title, without further description of any sort, and was issued by the Clerk of the Court at the request of William T. Wilson, counsel and City Attorney for the Plaintiff City of Temple.

Prior to the trial the Petitioner's co-counsel, Karl A. Maley, filed on Michael McKelva's behalf a timely motion to quash the subpoena (A. 4-6), asserting in the motion that compulsory production of the magazines pursuant to court process would contravene Mr. McKelva's privilege against self-incrimination. The motion to quash was thereafter orally argued before the Court at the commencement of the trial on February 1, 1973, after counsel for both sides had stipulated in open court that Mr. McKelva did not possess or have access to five of the fifty-two publications named in the subpoena (A. 7-8).

With respect to the remaining forty-seven magazines, as counsel for Mr. McKelva, the Petitioner urged in his argument before the Court on the motion to quash the subpoena that the publications in question dealt "explicitly

with acts of a sexual nature" (A. 8) and that, particularly in view of the criminal prosecutions that had previously been initiated against Mr. McKelva by the City of Temple, production of any of the magazines under the compulsion of a subpoena duces tecum would entail a substantial possibility of self-incrimination (A. 9).

Following the arguments of counsel, without assigning any reasons for his action, Judge Clawson overruled the motion to quash the subpoena (A. 15), after which counsel for both sides stipulated in open court that Michael McKelva and Allen Boyer had previously been convicted in the Municipal Court of the City of Temple, Texas in seven criminal cases involving the sale of allegedly obscene material, which were then on appeal to the County Court for a trial *de novo* (A. 15-17). The seven magazines providing the basis for these criminal prosecutions were purchased from the Defendants by officers of the Temple Police Department, and were subsequently introduced into evidence, without objection, during the trial on the injuction. None of these seven titles was among those listed in the subpoena duces tecum.

Michael McKelva was then called by counsel for the Plaintiff to testify as a witness on behalf of the City, and the following transpired:

"BY MR. WILSON:

Q. State your name and occupation to the Court, please.

A. My name is Michael McKelva. I live at 526 Wolf Street in Killeen, Texas. I am the operator of Mike's News in Temple, Texas.

Q. And is that Mike's Newsstand at 118-A South First Street?

A. Yes, sir, it is.

Q. Mr. McKelva, were you served with a sub-

poena requesting you to bring certain magazines, certain titled magazines to Court today?

A. Yes, sir, I was.

Q. And do you have those with you here today?

A. Sir, under the advice of Counsel, I refuse to answer on the grounds that it may tend to incriminate me.

Q. Do you recall the day when you were served with a copy of this subpoena?

A. Yes, sir, I do.

Q. And what was that day?

A. I believe that was day before yesterday.

Q. Did you at that time have in your possession the magazines listed in the subpoena?

A. Under the advice of Counsel, I plead the Fifth.

Q. Are you saying to the Court then that you did not bring those into Court today, the magazines listed in that subpoena?

A. Under the advice of counsel, I refuse to answer on the grounds that it may tend to incriminate me.

MR. WILSON: Your Honor, may we approach the bench?

THE COURT: Yes, sir.

(Conference of Court and Counsel.)

MR. WILSON: Your Honor, at this time, in response to the answers to the questions by Mr. McKelva as to the subpoena, a subpoena which was issued in this cause, I would ask the Court to instruct the Defendant, Michael McKelva, to produce the magazines listed in the subpoena within a reasonable time and if he refuses to hold him in contempt of Court." (A. 17-18)

Following a discussion between the Court and counsel with regard to the procedural adequacy of the subpoena and the tender of costs of production and witness fees, Judge Clawson determined that Mr. McKelva would be

permitted approximately two hours to secure the forty-seven magazines and to produce them in court that afternoon (A. 1, 18-20). The City then continued with the presentation of its evidence.

Immediately prior to the noon recess, Judge Clawson repeated his earlier instruction that Mr. McKelva was to respond to the subpoena by one o'clock that afternoon, and the defense acknowledged that it had understood the instruction (A. 20).

Following the noon recess, Michael McKelva was again called to the witness stand by counsel for the City, and again he refused to produce the forty-seven magazines (A. 21-22). Mr. Wilson then offered into evidence an affidavit establishing the tender of the witness fee, after which the following transpired:

"THE COURT: Do you have any questions that you want to ask this witness at this time?

MR. MANESS: Your Honor, if I might, I would like to ask the witness one question.

THE COURT: All right.

MR. MANESS: Mr. McKelva, are you refusing to produce the 47 magazines contained in the subpoena solely because you believe that the production of such magazines would entail a substantial possibility of self-incrimination?

A. Yes, sir, I do.

MR. MANESS: That is all I have, Your Honor.

THE COURT: You may stand down, Mr. McKelva." (A. 22-23)

Judge Clawson then found Michael McKelva to be in contempt of court and held, over the Petitioner's objection,

that the witness's failure to respond to the subpoena would be regarded as an admission that the publications named in it were obscene (A. 23-25). The Court deferred the imposition of punishment against Mr. McKelva until the conclusion of the trial, and the City continued with the presentation of its evidence.

The testimony of Sergeant Vernon McKenzie, an officer of the vice and narcotics division of the Temple Police Department, revealed that the titles of the magazines named in the subpoena had been obtained by the Sergeant during the course of his investigation of Mr. McKelva's newsstand on January 4, 1973. At that time the Sergeant made a written list of those publications that he suspected were displayed in violation of the Temple obscenity ordinance (Tr. 109-110). On cross-examination he testified that he possessed no independent recollection by which he could identify any of the magazines whose titles he had listed, that he had viewed only the partially concealed covers of the magazines and not their contents, and that he could not describe the cover of any particular magazine (A. 25-26).

No other evidence relating to the specific character, identity or description of the forty-seven magazines was introduced during the course of the trial. No evidence established the location of the magazines either on the date of trial or on the date Mr. McKelva was served with the subpoena duces tecum.

At the conclusion of the trial on February 2, 1973, Judge Clawson on his own motion recalled Michael McKelva to the witness stand, and the following transpired:

"THE COURT: Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness. In your testimony with reference to why you failed to do this, you first indicated that it was on the advice of Counsel that you were declining to obey the subpoena, and so I want to ask you directly this morning, is your disobedience to this subpoena your own decision, or is it on the advice of Counsel, and if so, what Counsel?

A. It is on the advice of Counsel, sir, and Mr. Friedman, Mr. Maley and Mr. Maness.

THE COURT: Does either Counsel have any questions that they want to ask this witness?

MR. MANESS: Your Honor, I would only like to ask Mr. McKelva, in the event that his Counsel were to advise him that his privileges against self-incrimination were not endangered by producing the 47 magazines in question, whether or not under those circumstances he would produce the magazines?

A. I would." (A. 27)

The Court then entertained the closing arguments of counsel and, after a short recess, granted the City's application for a permanent injunction against the exhibition, display, sale or offering for sale of the seven magazines that had been introduced into evidence, the forty-seven magazines named in the subpoena (which the Court found to be obscene "by admission of counsel") and "any other publication that meets the definition of obscenity" prescribed by Article 527 of the Texas Penal Code (A. 28-29). At the same time the Court adjudged Michael McKelva and his trial attorneys, the Petitioner and Karl A. Maley, to be in contempt of court, imposing

a fine of $200.00 and a sentence of confinement for ten days in the Bell County Jail against each of them (A. 29).

After Mr. Maley had excepted to the ruling of the Court and given oral notice of appeal, the following transpired:

> "THE COURT: Mr. Maley, I want to point out to you that this Court has been most reluctant to find counsel in contempt. As a matter of fact this [is] the first time in the history of this Court that I have ever adjudged an attorney to be in contempt of this Court but I find this Court totally frust[r]ated at the attitude of Counsel in denying the access to the evidence which was contained in the subpoena duces tecum.
>
> This Court has not been permitted to rule on the admissibility of that evidence. You have ruled on it, on the admissibility of that evidence.
>
> I have found you in contempt because you have usurped the authority of this Court.
>
> You are familiar with the statutes of the State of Texas which give you a hearing on this matter. If you desire to be released on personal bond there is a statutory provision if you desire to file a motion and you will be rel[e]ased on bond and this matter will be set for hearing before another Judge, who will be appointed by the administrative Judge of this District.
>
> MR. MANESS: Your Honor, may I be heard in my own behalf on one point?
>
> THE COURT: Yes, sir.
>
> MR. MANESS: If it please the Court, I certainly appreciate the Court's position. I think what we have here is not a situation, and I hope this is correct, where Counsel have deliberately and intentionally attempted to frustrate the Court. I think that rather

> what we have is where there is a philosophical difference between Counsel for the Defendant and the Court with regard to the applicable law as to self-incrimination and the production of evidence in a civil case.
>
> THE COURT: Which could have been reached by a motion to suppress that evidence or by an objection to an attempt to introduce it. Counsel himself has admitted that Defendant is in possession of these items, denying the ownership of them very carefully but admitting possession of them. You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court.
>
> This Court is offended by your ruling, gentlemen. I am imposing the punishment as previously announced, ten days in jail and a two hundred dollar fine in each case, which is subject to your motion if you desire to file one.
>
> MR. MANESS: Your Honor, on my own behalf, and on Mr. Maley's account, I apologize to the Court. I certainly want to express to this Court my own position and that is that it was not our intention or our purpose to offend the Court, and in that respect we apologize." (A. 31-32)

Michael McKelva was summarily jailed (A. 33). As officers of the Court the Petitioner and Mr. Maley were permitted by Judge Clawson to post a personal recognizance bond in order to secure their release pending trial of their guilt or innocence before a different District Judge in accordance with the provisions of Article 1911a, section 2(c) of the Revised Civil Statutes of Texas. Several days later the Court entered a formal written judgment, reproduced in Appendix A of the petition for certiorari at pages 30-32, finding Michael McKelva in

contempt for his disobedience of the subpoena and also finding the attorneys in contempt for "advising and counseling" their client's disobedience of the subpoena.

On February 2, 1973, the date on which Michael McKelva was initially confined for contempt by Judge Clawson, the Supreme Court of Texas denied an original application for habeas corpus relief filed by the Petitioner on Mr. McKelva's behalf "pending further information to complete the record." The writ was finally denied by that Court on February 5, 1973.

On February 8, 1973 the Petitioner filed an application for Federal habeas corpus relief on Michael McKelva's behalf in the United States District Court for the Western District of Texas, Waco Division. The Court immediately entered an order setting an expedited hearing on the merits of the case and directing the Sheriff of Bell County, Texas to appear by counsel at the hearing to show cause why the writ should not be granted and Mr. McKelva ordered discharged from confinement.

At 10:00 a.m. on February 8, 1973 Judge Clawson ordered Michael McKelva released from custody "for good behavior" and remitted the remaining three days of the jail sentence and the entirety of the $200.00 fine (A. 2). Mr. McKelva's Federal habeas corpus action was thereafter dismissed for mootness.[2]

By letter Judge Clawson also notified the Honorable Herman Jones, presiding judge of the Third Administra-

2. Although the orders entered in the collateral habeas corpus proceedings involving Michael McKelva were not certified and transmitted as part of the original record in this cause, they are properly subject to judicial notice by the Court, *Brown v. Board of Education*, 344 U.S. 1, 3 (1952); *New York Indians v. United States*, 170 U.S. 1, 32 (1898), and accordingly are reproduced in Appendix B of this brief at pages 69-73.

tive Judicial District of Texas, that the attorneys had been adjudged in contempt of court, that they had requested trial before a different District Judge in accordance with Article 1911a, and that they had been released on their own recognizance. Judge Jones promptly appointed the Honorable James R. Meyers, presiding judge of the 126th Judicial District Court of Travis County, Texas and the Respondent herein, to preside by special designation at the contempt trial, which was held in the courtroom of the 169th Judicial District Court in Belton, Texas on May 11, 1973.

At that trial a representative of the Attorney General of Texas appeared in support of the contempt judgment against the attorneys at the request of Judge Jones. By agreement of counsel for both sides in open court, with the concurrence of Judge Meyers, the case was tried exclusively upon the basis of the record of the trial before Judge Clawson; no additional testimony or other evidence was presented (A. 34-37).

With respect to the merits of the contempt judgment, the attorneys advanced two distinct defenses in their trial before Judge Meyers:

First, they asserted that Judge Clawson's order to produce the forty-seven magazines demanded by the subpoena duces tecum had been altogether void in view of Michael McKelva's legitimate invocation of the Fifth Amendment privilege against self-incrimination, thereby precluding a determination that advice to resist the subpoena amounted to a contempt of court (Tr. 11-12). Opposing counsel agreed that the judgment of contempt could not be sustained if the Fifth Amendment privilege had been properly claimed (A. 37).

Secondly, regardless of whether Mr. McKelva's assertion of the Fifth Amendment privilege were ultimately sustained, the attorneys argued that involuntary production of the forty-seven magazines pursuant to the subpoena would have risked the irrevocable and irretrievable surrender of a fundamental constitutional right in the absence of any effective judicial remedy for testing the legality of Judge Clawson's order prior to the time that compliance was demanded, and that under these circumstances traditional conceptions of an attorney's professional obligation to his client would dictate and justify advising resistance to the subpoena (Tr. 53-55).

Since the record before the Court reflected only that Michael McKelva had refused to produce the forty-seven magazines "on advice of counsel," the attorneys also suggested that the "advice" might have consisted of no more than a legal opinion of Mr. McKelva's rights under the Fifth Amendment. Judge Meyers rejected this interpretation and concluded that the attorneys had actually advised their client not to produce the magazines (A. 37-40).[3]

At the conclusion of the trial Judge Meyers indicated that he was not prepared to rule on the matter immediately and requested counsel for both sides to submit additional legal memoranda on the questions of law involved. Following the adjournment of the proceedings, counsel promptly complied with the Court's request.

3. In order to resolve conclusively any possible doubt on this point, the Petitioner admits that he advised Mr. McKelva to avoid the risk of involuntarily surrendering his rights under the Fifth Amendment by refusing to produce the magazines, after first explaining to his client the available legal alternatives involved and the possible legal consequences that might have resulted from adopting any one of them.

On September 28, 1973 Judge Meyers signed the judgment of contempt reproduced on pages 27-29 of the petition for certiorari, affirming the contempt judgment entered against the attorneys by Judge Clawson but assessing fines of $500.00 against each of them in lieu of the punishment previously imposed. The September 28 judgment also provided that the fines were to be paid to the Clerk of the 169th Judicial District Court not later than 12 o'clock noon on October 12, 1973, a procedure designed by Judge Meyers to permit the attorneys to secure further appellate review of his decision without being forced to undergo actual physical imprisonment because of their failure to pay the fines (A. 40).

On October 11, 1973, after being advised that both the Court of Criminal Appeals of Texas and the Supreme Court of Texas had declined to review the validity of the contempt judgment on its merits, Judge Meyers signed an order permitting the attorneys to remain enlarged on their personal recognizance, despite their failure to pay the fines, in order to permit further avenues of relief to be exhausted. (A. 41-42).

The Petitioner's co-counsel, Karl A. Maley, then filed an application for the writ of habeas corpus in the United States District Court for the Western District of Texas, Waco Division, on October 25, 1973, one day after the filing of the petition for certiorari in this cause. On the same day Judge Meyers signed a second order continuing the attorneys on their personal recognizance until the conclusion of these proceedings, and further providing that if either proceeding terminated in a final order or judgment having the effect of upholding the judgment of contempt the attorney involved would be ordered to surrender himself to the custody of the Sheriff of Bell County, Texas until the $500.00 fine had been paid. (A. 43-44).

On December 20, 1973 the United States District Court entered a seven-page memorandum opinion and order granting Mr. Maley's application for habeas corpus relief and directing that he be relieved of all restraint imposed by the contempt judgment entered against him by Judge Meyers.[4] The District Court's decision was appealed to the United States Court of Appeals for the Fifth Circuit, where the case was docketed as Number 74-1619, *Maley v. Meyers*. The Fifth Circuit has stayed further proceedings in the *Maley* case in anticipation of the Court's decision in the present case.

The petition for certiorari in this cause was granted by the Court on April 15, 1974.

SUMMARY OF THE ARGUMENT

This case involves the fundamental right of a lawyer to give professional advice to his client, and the right of the client to accept it, subject to whatever legal sanctions may become available against the client, without fear that the lawyer's independence will be chilled by the possibility that he may be summarily punished if the advice proves incorrect. In this context, the advice given here—to exercise Fifth Amendment rights—is actually subsidiary.

However, the Petitioner has fully briefed the correctness of the advice given to demonstrate that it was indeed sound and fully authorized by precedent.

Unlike many of the contempt cases involving attorneys that have previously been considered by the Court,[5] this

4. The unreported memorandum opinion, order and judgment are reproduced in Appendix C of this brief at pages 74-82.

5. For example, *Ungar v. Sarafite*, 376 U.S. 575 (1964); *Offutt v. United States*, 348 U.S. 11 (1954); *Sacher v. United States*, 343 U.S. 1 (1952); *Cooke v. United States*, 267 U.S. 517 (1925); *Ex parte Terry*, 128 U.S. 289 (1888).

one is not colored in the least degree by any disrespectful, insulting, antagonistic or disruptive behavior or language by counsel in the presence of the Trial Judge. The entire record uniformly reflects that throughout the course of the proceedings neither the lawyers nor the Court manifested on any occasion the slightest animosity, anger or discourtesy but, on the contrary, consistently displayed toward each other an undisturbed and uninterrupted attitude of respectful intellectual equality. Until Judge Clawson stated at the conclusion of the trial that he was finding the attorneys in contempt, nothing whatever had transpired to suggest that the Court would ultimately view the Petitioner's advice to his client in that light.[6]

Nor is this a situation in which the Petitioner was adjudged in contempt for having himself violated any order or decree of the Court.[7] At no time during the trial did Judge Clawson order either of the defense attorneys to produce the forty-seven magazines or to advise their client to produce them.

Rather, this is a case in which an attorney has been found in criminal contempt of court and ordered to pay a $500.00 fine for having advised his client to assert the

6. The absence of any prior warning that the Court would punish the Petitioner's advice to his client as a criminal contempt provides at least an arguable basis for reversing the judgment for lack of fair notice. *Eaton v. City of Tulsa*, 42 U.S.L.W. 3538 (March 25, 1974) (concurring opinion by Mr. Justice Powell); *cf. Ungar v. Sarafite*, 376 U.S. 575, 585 (1964); *Sacher v. United States*, 343 U.S. 1, 5 (1952).

However, the Petitioner expressly disclaims reliance on such a theory, essentially because his advice to his client would not have been different even if he had been apprised beforehand of Judge Clawson's inclination to regard it as contemptuous.

7. For example, *Nilva v. United States*, 352 U.S. 385 (1957); *Fisher v. Pace*, 336 U.S. 155 (1949); *Hickman v. Taylor*, 329 U.S. 495 (1947).

Fifth Amendment privilege against self-incrimination. As suggested by the petition for certiorari, it appears to have no precedent in the constitutional history of this country or in the recorded history of the Anglo-American common law.

The judgment of contempt must be reversed and the Petitioner ordered discharged for the following reasons:

First, it is axiomatic that a witness cannot be adjudged in contempt of court merely for having lawfully invoked the Fifth Amendment privilege against self-incrimination. *Quinn v. United States*, 349 U.S. 155 (1955); *Hoffman v. United States*, 341 U.S. 479 (1951); *Blau v. United States*, 340 U.S. 159 (1950); *cf Gelbard v. United States*, 408 U.S. 41 (1972).[8] By implication an attorney must necessarily be immune from punishment for contempt simply for having advised his client to assert in a lawful manner a fundamental right guaranteed by the Constitution of the United States. Accordingly, if Judge Clawson's order directing compliance with the subpoena to produce the forty-seven magazines violated Michael McKelva's Fifth Amendment privilege, the contempt judgment against the Petitioner obviously cannot stand.

In view of the witness's legitimate reliance on the privilege against self-incrimination, Judge Clawson's order to produce the magazines was manifestly unconstitutional. The characterization of the proceedings as "civil" in nature has not the slightest bearing on the question, *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924), and on this record there can be no argument that the privilege was not invoked in a timely or procedurally sufficient manner. *Quinn v. United States*, 349 U.S. 155, 164 (1955); *cf. United States v. Kordel*, 397 U.S. 1, 5 (1970). The danger of involuntary self-incrimination was real and appreciable,[9] not remote, speculative or insubstantial, *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S.. 472, 478 (1972); *Brown v. Walker*, 161 U.S. 591, 599-600 (1896), thereby negating any possible suggestion that compliance with the subpoena could not possibly have had a tendency to incriminate the witness. *Hoffman v. United States*, 341 U.S. 479, 488 (1951); *United States v. Burr*, F. Cas. No. 14692e (C.C. Va., 1807). And, of course, the Court has traditionally recognized that not only testimonial but also documentary evidence sought by subpoena or equivalent court process is within the scope of the privilege, *United States v. Saline Bank*, 1 Pet. 100, 104 (1828); *Boyd v. United States*, 116 U.S. 616 (1886); *Schmerber v. California*, 384 U.S. 757, 764 (1966), and that concepts of ownership or legal title do not determine the privilege's availability. *Couch v. United States*, 409 U.S. 322, 330-34 (1973); *Perlman v. United States*, 247 U.S. 7, 15 (1918).

Since the magazines were themselves inherently testimonial or communicative in character, it cannot be plausibly maintained that compliance with the subpoena duces tecum would have been comparable to the production of identifying physical characteristics involving "no

8. On page 7 of the brief in opposition to the petition for certiorari, the Respondent advances the startling thesis that "the invalidity of a judicial order [directing compulsory self-incrimination] does not vitiate a contempt judgment."

This inexplicable misunderstanding and misapplication of the Court's decisions in such cases as *United States v. United Mine Workers*, 330 U.S. 258 (1947) and *Walker v. City of Birmingham*, 388 U.S. 307 (1967) is explored in this brief in connection with the second question presented for review.

9. Michael McKelva was neither offered nor granted immunity from criminal prosecution in exchange for the production of the forty-seven magazines.

compulsion of the accused to give evidence having testimonial significance." *United States v. Wade*, 388 U.S. 218, 222 (1967); *United States v. Dionisio*, 410 U.S. 1 (1973); *United States v. Mara*, 410 U.S. 19 (1973); *cf. California v. Byers*, 402 U.S. 424 (1971). The publications admittedly were subpoenaed only for the purpose of accomplishing the disclosure of their communicative content; requiring production of them was no different in principle from demanding that the witness describe in detail under oath the communications they contained. *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906).

Conceding by implication that all of these considerations might otherwise have justified Michael McKelva's invocation of the Fifth Amendment privilege, the Respondent nevertheless finds decisive significance in the fact that the magazines were previously displayed for commercial distribution. The theory is constructed on the twin premises that (i) the protection of the privilege extends only to the compulsory disclosure of "private" (in the sense of "confidential") documentary evidence, and (ii) that entitlement to the privilege was "waived" by the previous commercial display of the publications.

The problem with the Respondent's position arises almost entirely from the indefensibility of its assumptions. None of the Court's previous decisions suggests that Fifth Amendment consequences are contingent "upon the degree of privacy which attended the creation or maintenance of particular [documents] or upon the intimacy of the information which they contained." *United States v. Cohen*, 388 F.2d 464, 471 (9 Cir., 1967). On the contrary, the Court's periodic references to "private documents" have consistently been employed to exclude from the scope of the privilege's protection the type of

documentary evidence held in a *representative* ("public") capacity, *Shapiro v. United States*, 335 U.S. 1, 17 (1948); *Davis v. United States*, 328 U.S. 582, 589-90 (1946); *United States v. White*, 322 U.S. 694, 699 (1944); not to limit the constitutional prohibition against self-incrimination to the involuntary disclosure of communicative evidence characterized by some nebulous degree of confidentiality.

Even apart from the practical impossibility of formulating any workable distinction between "confidential" and "non-confidential" evidence, the Respondent's theory has the additional disadvantage of being historically insupportable. Unlike the Fourth Amendment, the origins of which reflect almost exclusive concern for interdicting unwarranted official assaults on individual privacy, the Fifth Amendment serves the additional and entirely distinct function of shielding a person from the hazards of *any sort* of testimonial production involving potentially self-incriminatory disclosures. Consequently, considerations of privacy that are frequently relevant in delineating the contours of the Fourth Amendment, *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968); *Katz v. United States*, 389 U.S. 347, 351 (1967), are necessarily subordinate or altogether irrelevant in a Fifth Amendment context, where the fundamental question is whether the State has utilized physical or moral compulsion in an effort to secure involuntary, potentially incriminating communications from an unwilling victim, *Couch v. United States*, 409 U.S. 322, 327 (1973); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *United States v. White*, 322 U.S. 694, 698 (1944). Such compulsion is constitutionally illegitimate regardless of whether the information extracted is characterized as "confidential" or not.

The suggestion of "waiver" is equally unpersuasive. This Court has traditionally declined to infer acquiescence in the loss of fundamental constitutional rights from mere inaction or a silent record, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1969), and in an equivalent Fifth Amendment environment it has already decisively rejected the argument that "an inference of antecedent choice" will effectively abrogate the privilege's protection, *Marchetti v. United States*, 390 U.S. 39, 51-52 (1968), just as it has found intolerable the suggestion that the exercise of one constitutional right may result in the surrender of another. *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Moreover, the "waiver" theory disregards the critical circumstance that the very *act* of complying with a subpoena duces tecum demanding tangible physical evidence *by itself* entails testimonial or communicative consequences to the extent that such production necessarily verifies or authenticates the evidence produced as that demanded by the subpoena. Accordingly, a previous commercial display of the forty-seven magazines could not "waive" the testimonial disclosure implicit in the fact of compliance. *Curcio v. United States*, 354 U.S. 118, 125 (1957); 8 Wigmore, *Evidence* § 2264 (McNaughton rev. 1961); McCormick, *Evidence* § 126 (2nd ed. 1972).

Virtually all State and Federal courts have thus far assumed almost as a matter of course that resistance to court process seeking an involuntary production of allegedly obscene material is justified under the Fifth Amendment. *Smith v. Fair*, 363 F. Supp. 1021 (N.D. Ohio, W.D. 1973); *State v. Eros Cinema, Inc.*, 262 La. 706, 264 So. 2d 615, 619 (1972). The only decision to the contrary thus far discovered by the Respondent is distinguishable on its facts from the present case, frankly predicated on the discredited "waiver" approach and grounded ultimately

on the unfortunate misconception that an individual who asserts the Fifth Amendment privilege must necessarily be guilty of a criminal offense, a myth this Court has sought consistently to dispel. *Slochower v. Board of Higher Education*, 350 U.S. 551, 557-58 (1956); *Ullman v. United States*, 350 U.S. 422, 426 (1956).

Aside from the question of whether Michael McKelva was actually entitled to invoke the Fifth Amendment privilege to resist production of the forty-seven magazines, the contempt judgment against the Petitioner must still be reversed for an even more fundamental reason: because it is constitutionally intolerable that an attorney should be adjudged in contempt of court merely for having advised his client to assert the privilege against self-incrimination.

Obviously the Petitioner is not irresponsibly arguing on behalf of himself and other members of the Bar for an unrestricted right to counsel resistance to the orders and processes of the courts. Respect for the rule of law and the established role of the judiciary as the referee of legal disputes ordinarily dictates that the orders of any Judge must be obeyed until they are revoked, modified or set aside by a higher court in an orderly manner. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

But neither the Petitioner nor the Court has ever been committed to the authoritarian philosophy that disobedience of a court order is *never* justified under *any* circumstances. When fundamental constitutional rights have been threatened by unreviewable judicial decrees, the Court has never hesitated to set aside contempt judgments resulting from resistance to them. *Johnson v. Virginia*, 373 U.S. 61 (1963); *Hamilton v. Alabama*, 376 U.S. 650 (1964). For the same reasons a witness has always been

accorded the option of testing his entitlement to the Fifth Amendment privilege in a higher forum by refusing to submit to a Trial Judge's directive that he forego it; as a practical matter, disobedience of such an order constitutes the *only* truly effective method for preserving the privilege intact. *Hoffman v. United States,* 341 U.S. 479, 486-87 (1951); *United States v. Dickinson,* 465 F.2d 496, 512 (5 Cir., 1972).

Judge Clawson's remarkable assertion that Michael McKelva was obligated to produce the magazines and *thereafter* to assert his Fifth Amendment privilege by seeking to suppress their use as evidence in any resulting criminal prosecution (A. 32) is contrary to more than a century and a half of precedent, *Hoffman v. United States,* 341 U.S. 479, 488 (1951); *United States v. Burr,* F. Cas. No. 14692e (C.C. Va., 1807), and logically implies that (i) no witness can ever continue to assert the privilege after a Judge's rejection of it, and (ii) that the Court's long line of decisions dealing with immunity statutes, culminating in *Kastigar v. United States,* 406 U.S. 441 (1972) and *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472 (1972) is superfluous because *no* grant of immunity is ever required.

The Judge's position simply overlooks the fact that the exclusionary rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) and *Miranda v. Arizona,* 384 U.S. 436 (1966) is the necessary consequence of the judiciary's practical inability to interdict violations of Fourth and Fifth Amendment rights *before they occur.* Exclusion of illegally obtained evidence after a criminal prosecution has already been initiated on the basis of it is hardly the functional equivalent of a before-the-fact grant of use and derivative use immunity under the standards prescribed by *Kastigar* and *Zicarelli.*

From this perspective Michael McKelva's compliance with the subpoena would certainly have risked an irretrievable surrender of Fifth Amendment rights, resulting exclusively from the Trial Court's misconception of the law, in circumstances where effective judicial review of the suspect order was not available prior to the time that compliance was demanded. An individual in this predicament is constitutionally entitled to encouragement and advice to resist the demand, and his lawyer is constitutionally entitled to give it to him, as a necessary consequence of the complex of values inherent in the Fifth, Sixth, Ninth and Fourteenth Amendments. *In re Watts,* 190 U.S. 1, 29 (1903); *Miranda v. Arizona,* 384 U.S. 436 (1966); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The record in this case is wholly devoid of the slightest evidence of contumacious intent, *In re Brown,* 454 F.2d 999, 1007 (D.C. Cir., 1971); *United States v. Seale,* 461 F.2d 345, 367 (7 Cir., 1972), and thus far there has been not the slightest suggestion that the Petitioner was not acting in absolute and unassailable good faith. His conduct was sanctioned, not condemned, by the Code of Professional Responsibility of the American Bar Association. All of these considerations lead inevitably to the conclusion that, when confronted with a Judge's hostility or insensitivity to the exercise of the Fifth Amendment privilege, an attorney owes allegiance to his client's constitutional rights, not to the court order that threatens them.

In the last analysis this case has arisen because of Judge Clawson's mistaken conviction that his decision

on the matter was final and that Michael McKelva and his attorneys were obligated to abide by it. That supposition can never be accepted as long as this Court, rather than the 169th Judicial District Court of Bell County, Texas or some other subordinate tribunal, remains the ultimate arbiter of constitutional disputes and the final definitive authority on the scope of protection afforded by the Bill of Rights. *Marbury v. Madison*, 1 Cranch 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958).

ARGUMENT

1. The Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

The sole argument advanced before Judge Clawson to justify the City's demand for the production of the forty-seven magazines despite Michael McKelva's claim of the privilege against self-incrimination was premised on the assertion that the trial was merely a "civil" proceeding and, by implication, that the privilege was unavailable in such a context (A. 12). On page 5 of the brief in opposition to the petition for certiorari, the Respondent apparently attaches a similar mystical significance to that characterization. It is, of course, altogether irrelevant.

The exercise of the privilege in "civil" proceedings has been sustained for almost a century and a half. *United States v. Saline Bank*, 1 Pet. 100, 104 (1828). The Fifth Amendment "can be asserted in *any* proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory; and it protects against *any* disclosure which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (emphasis added). Any veiled suggestion to the contrary has been eclipsed by history.[10]

Likewise, the record provides no support for an argument that Michael McKelva did not invoke the privilege in a timely, articulate, procedurally effective manner. "As everyone agrees, no ritualistic formula is necessary to invoke the privilege." *Quinn v. United States*, 349 U.S. 155, 164 (1955); *Emspak v. United States*, 349 U.S. 190, 194 (1955). The witness appeared in court as commanded by the subpoena, assumed the witness stand and readily answered all questions that did not call for potentially self-incriminatory responses. He explicitly invoked the Fifth Amendment in declining to answer specific questions regarding the forty-seven magazines (A. 17-18) and in declining to produce them pursuant to the subpoena (A. 22-23), stating clearly and unequivocally that he would have done so if his attorneys had advised him that production would not have endangered his privilege against self-incrimination (A. 27). Prior to the trial the defense filed a timely motion to quash the subpoena (A. 4-6), and throughout the course of the

10. *Boyd v. United States*, 116 U.S. 616 (1886); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924); *Quinn v. United States*, 349 U.S. 155, 161 (1955); *Watkins v. United States*, 354 U.S. 178, 195-96 (1957).

trial that motion was continually reurged for the Trial Judge's reconsideration (Tr. 24, 28-29, 82-83). Under such circumstances it cannot be suggested that the Court was not fairly and thoroughly apprised of the witness's position in the matter.

Likewise, the situation was not conceivably one in which the real and appreciable danger of self-incrimination was open to question. The Petitioner readily conceded that all of the publications dealt "explicitly with acts of a sexual nature" (A. 8), a fact established quite plainly by their titles alone (A. 2-4). Coupled with the City's previous prosecution and conviction of the witness for the sale of obscene material and its own position that the communicative content of the magazines was obscene in a constitutional sense, the circumstances lead inevitably to the conclusion that the privilege was not rendered inoperative because the hazards of testimonial compulsion were remote, speculative or insubstantial.[11]

In any event the Court has never demanded that the witness demonstrate the potentially self-incriminatory consequences of producing testimony or documentary evidence; a reasonable apprehension that the evidence produced will provide a subsequent basis for criminal prosecution is sufficient. Thus, the invocation of the privilege must invariably be sustained unless it is *"perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers *cannot possibly* have [a] tendency" to incrim-

11. *Zicarelli v. New Jersey State Commission of Investigation,* 406 U.S. 472, 478 (1972); *Leary v. United States,* 395 U.S. 6, 16 (1969); *Rogers v. United States,* 340 U.S. 367, (1951); *Mason v. United States,* 244 U.S. 362, (1917); *Heike v. United States,* 227 U.S. 131, 144 (1913); *Twining v. New Jersey,* 211 U.S. 78, 91 (1908); *Brown v. Walker,* 161 U.S. 591, 599-600 (1896).

inate. *Hoffman v. United States,* 341 U.S. 479, 488 (1951) (emphasis added); *Arndstein v. McCarthy,* 254 U.S. 71, 73 (1920); *United States v. Burr,* F. Cas. No. 14692e, p. 40 (C.C. Va., 1807). Plainly that rigorous standard was not satisfied in the circumstances of the present case.

The fact that the testimonial disclosure would have involved documentary evidence, rather than oral testimony, likewise did not exclude production of the forty-seven magazines from the scope of the privilege. The constitutional prohibition against compulsory self-incrimination resulting from compliance with a subpoena duces tecum or equivalent court process has been recognized since *United States v. Saline Bank,* 1 Pet. 100, 104 (1828) and *Boyd v. United States,* 116 U.S. 616, 630 (1886). It is now beyond argument that "the protection of the privilege reaches an accused's communications, *whatever form they may take,* and the compulsion of responses which are also communications, *for example, compliance with a subpoena to produce one's papers." Schmerber v. California,* 384 U.S. 757, 763-64 (1966) (emphasis added); *Couch v. United States,* 409 U.S. 322, 329 (1973). Obviously the forty-seven magazines were as much Michael McKelva's "communications" for purposes of the Fifth Amendment as they were in connection with their entitlement to presumptive protection under the First. *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963); *Marcus v. Search Warrants,* 367 U.S. 717 (1961); *cf. New York Times Company v. United States,* 403 U.S. 713 (1971).

Finally, the fact that Mr. McKelva disclaimed *ownership* of the publications (A. 8) did not preclude his

exercise of the privilege in light of the fact that his *possession* of them was undisputed. "To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line." *Couch v. United States*, 409 U.S. 322, 330 (1973). Both Article 527 of the Texas Penal Code and the obscenity ordinance enacted by the City of Temple imposed criminal sanctions against possession of obscene material, not the ownership of it. Particularly in this situation, "the criterion of immunity [is] not the ownership of property but the 'physical or moral compulsion' exerted." *Perlman v. United States*, 247 U.S. 7, 15 (1918); *Johnson v. United States*, 228 U.S. 457 (1913).[12]

Of course, not every compelled production of potentially incriminating evidence is outlawed by the Fifth Amendment. For example, the extraction of blood for the purpose of laboratory analysis even over the donor's objecton does not contravene the privilege, *Schmerber v. California*, 384 U.S. 757 (1966); nor does the involuntary appearance of a suspect in a lineup for identification purposes, *United States v. Wade*, 388 U.S. 218 (1967); nor does the taking of voice samples, *United States v. Dionisio*, 410 U.S. 1 (1973); or handwriting exemplars, *United States v. Mara*, 410 U.S. 19 (1973); *Gilbert v. California*, 388 U.S. 263 (1967); or fingerprints, *Smith v. United States*, 324 F.2d 879, 882 (D.C. Cir., 1963).

12. In his brief before the Fifth Circuit in the *Maley* case, the Respondent relies in part on Rule 206 of the American Law Institute's Model Code of Evidence (1942) in support of the contention that ownership determines entitlement to the privilege.

Whatever the credentials of its architects as constitutional authorities, the antiquated Model Code is worthless as a guide to the contemporary dimensions of the Fifth Amendment privilege. Compare Rule 233 of the Model Code with *Griffin v. California*, 380 U.S. 609 (1965) and *Brooks v. Tennessee*, 406 U.S. 605 (1972).

As long ago as *Holt v. United States*, 218 U.S. 245, 252 (1910), Mr. Justice Holmes observed that only "an extravagant extension of the 5th Amendment" would bar the use of all evidence originating with or provided by a suspect, pointing out that the extension of such a principle to the limits of its logic would justify a criminal defendant's refusal to attend his own trial because of the danger of incriminating identification. Accordingly, the prohibition against compelling an individual to incriminate himself has traditionally been regarded as "a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." *Id.*

Quite obviously the involuntary delivery of forty-seven allegedly obscene magazines into court in response to a subpoena duces tecum cannot realistically be equated with the production of identifying physical characteristics involving "no compulsion of the accused to give evidence having testimonial significance." *United States v. Wade*, 388 U.S. 218, 222 (1967). Such a testimonial response is not "an essentially neutral act," *California v. Byers*, 402 U.S. 424, 432 (1971), but precisely the sort of communicative revelation that up to now has always been regarded as being within the scope of the Fifth Amendment privilege. *United States v. Saline Bank*, 1 Pet. 100, 104 (1828); *Boyd v. United States*, 116 U.S. 616 (1886); *Couch v. United States*, 409 U.S. 322, 323 (1973). Under such circumstances the witness was "no more bound to produce the book than to give testimony to the facts which it disclosed." *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906).

Against these considerations the Respondent advances the argument that Michael McKelva's previous display

of the publications for sale to the public rendered his invocation of the Fifth Amendment privilege ineffective. There are at least two distinct assumptions implicit in this approach: first, that periodic references in the Court's previous decisions to "private papers" have limited the application of the privilege to *private* (in the sense of "confidential") documentary evidence; and, secondly, that a previous commercial display of the magazines constituted a "waiver" of the privilege. The position is altogether insupportable because neither of its premises can be sustained.

First of all, the Court's utilization of the phrase "private books and papers" in *Boyd v. United States*, 116 U.S. 616 (1886) clearly did not contemplate such a restricted interpretation of the privilege; a shipping invoice for twenty-nine cases of plate glass is hardly the sort of document whose existence or communicative content can reasonably be characterized as "confidential."[13] That interpretation of the term "private" was subsequently excluded by the decision in *Wilson v. United States*, 221 U.S. 361, 378 (1911), holding that "where one's *private* documents would tend to incriminate him, the privilege exists although they were actually written by another person" (emphasis added). And in *United States v. White*, 322 U.S. 694, 699 (1944), the Court held that "the papers and effects which the privilege protects must be the *private* property of the person claiming the privilege, or at least in his possession in a purely *personal* capacity" (emphasis added).

13. Of course, documentary evidence that has at some previous point in time lost all indicia of confidentiality may nevertheless have reassumed "private" characteristics by the time a subpoena seeks its disclosure, thereby providing a realistic claim for both Fourth *and* Fifth Amendment protection, as in *Boyd* itself.

But this is simply to say that the communicative content of *all* subpoenaed documents is necessarily "confidential," to the extent that the party demanding their production is unable to secure the information they contain from any other source. Plainly the Respondent is not suggesting that the *communications* contained in the forty-seven magazines were not "private" *and* "confidential" in every meaningful sense on the date of the trial. The City could produce no witnesses to testify either to the communicative content of the publications or to their whereabouts at any time after January 4, 1973.

Each of these decisions establishes that "private" documents need not contain "confidential" communications so long as they are held in a *personal* rather than a *representative* capacity. Thus, in a long line of decisions,[14] the Court has determined that the protection of the privilege extends only to *private* individuals, not to economic or political aggregations such as corporations, labor unions and the like. "A custodian [of corporate records], by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers." *Curcio v. United States*, 354 U.S. 118, 123-24 (1957).

In a similar sense the Court has refused to extend the privilege to those records required by law to be kept as part of a legislative regulatory program unrelated to the detection of crime. *Shapiro v. United States*, 335 U.S. 1, 17 (1948); *Davis v. United States*, 328 U.S. 582, 589-90 (1946); *Wilson v. United States*, 221 U.S. 361, 380 (1911); *cf. United States v. Sullivan*, 274 U.S. 259 (1927). Implicit in this approach is the recognition that such "required

14. *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. United States*, 221 U.S. 361 (1911); *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946); *United States v. White*, 322 U.S. 694, 699 (1944); *Rogers v. United States*, 340 U.S. 367, 372 (1951); *McPhaul v. United States*, 364 U.S. 372, 380 (1960).

records" have a "public aspect" that necesarily provides the government with a greater claim to possession of them than the individual maintaining them. "The distinction is between property to which the government is entitled to possession and the property to which it is not." *Davis v. United States*, 328 U.S. at 590.

Obviously, however, the City of Temple could not conceivably have asserted a possessory interest in the forty-seven magazines superior to Michael McKelva's; on the contrary, his right to possession of them was presumptively established by the First, Fourth and Fourteenth Amendments. He did not hold the publications in a representative capacity, nor were they records required to be kept by law. Consequently, none of the established exceptions to the privilege are relevant.

The Respondent's effort to limit the scope of the Fifth Amendment to documentary evidence characterized by some undefined degree of "privacy" finds not the slightest support in precedent; lower court decisions are all the other way. See, *e.g., United States v. Judson*, 322 F.2d 460, 462-63 (9 Cir., 1963) (cancelled checks and bank statements); *de Antonio v. Solomon*, 42 F.R.D. 320 (D. Mass., 1967) (passport). The Ninth Circuit has explicitly disclaimed the theory. *United States v. Cohen*, 388 F.2d 464, 471 (9 Cir., 1967). And by implication this Court has also rejected it in *Couch v. United States*, 409 U.S. 322 (1973), since the taxpayer's records involved there were no more and no less "confidential" than the magazines involved here.

Even apart from precedent, however, there remains the practical impossibility of drawing any principled constitutional distinction between "confidential" communica-

tions protected by the Fifth Amendment and "nonconfidential" communications that are not. A gunman cannot reasonably regard as "confidential" his *res gestae* statements during the course of a bank robbery, but the Fifth Amendment would plainly protect him against being forced to repeat those statements under oath as a witness at his own trial.

The source of the Respondent's confusion arises from the misconception that the privilege against self-incrimination serves only to protect a right of "privacy." Certainly that is *one* of its functions, and in this respect the Fourth and Fifth Amendments "run almost into each other." *Boyd v. United States*, 116 U.S. 616, 630 (1886); *Davis v. United States*, 328 U.S. 582, 587 (1946); *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). However, the Fifth Amendment has traditionally been viewed as a constitutional safeguard protecting an individual against the use of "physical or moral compulsion to extort communications from him," *Holt v. United States*, 218 U.S. 245, 252 (1910), thus preserving a fundamental human value having little if anything to do with any questions of confidentiality. The right of privacy is not the ultimate origin of the admonition that, under our adversary system of justice, "prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law." *United States v. White*, 322 U.S. 694, 698 (1944); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Ullman v. United States*, 350 U.S. 422, 428 (1956).

Consequently, a "reasonable expectation of privacy" that may be of critical significance in a Fourth Amendment context, *Couch v. United States*, 409 U.S. 322, 328 (1973); *United States v. Dionisio*, 410 U.S. 1, 8-9

(1973); *Terry v. Ohio*, 392 U.S. 1, 29-30 (1968); *Katz v. United States*, 389 U.S. 347, 351 (1967); *Lewis v. United States*, 385 U.S. 206, 211 (1966), is always subordinate and frequently irrelevant when the issue of primary concern is not the "private" character of the communications but the fact of an official effort to extort them under compulsion. *Couch v. United States*, 409 U.S. 322, 328 (1973). Our entire constitutional history rebels at the suggestion that the extortion may be justified so long as the information obtained can be characterized as a matter of public knowledge.

The "waiver" theory is equally flawed, proceeding from the essentially fictional premise that an individual who offers magazines for sale to the public intends by that act to forego any future claim of the Fifth Amendment privilege with regard to the communicative content of the magazines themselves. There is simply nothing whatever in the record to suggest that Michael McKelva had the slightest intention of relinquishing such a fundamental constitutional right when he opened his newsstand; that fact in itself is enough to defeat any claim of "waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Glasser v. United States*, 315 U.S. 60, 70 (1942); *Smith v. United States*, 337 U.S. 137, 150 (1949); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Boykin v. Alabama*, 395 U.S. 238 (1969).

Moreover, a virtually identical argument has already been considered and rejected by the Court in *Marchetti v. United States*, 390 U.S. 39 (1968), where the Government contended that, even if the disclosures required by the Federal wagering tax statutes were within the scope of the privilege, the individuals affected by them had "waived" their Fifth Amendment rights by failing to

register and voluntarily continuing to gamble. "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51-52.

Essentially the Respondent is arguing that Michael McKelva's exercise of his rights under the First Amendment required him to give up the guarantees of the Fifth. Again, the contention has already been effectively denied, the Court finding it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968); *United States v. Jackson*, 390 U.S. 570, 582-83 (1968); *cf. Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

Like the attempt to limit the privilege's application to "private" documentary evidence, the argument based on waiver has the practical disadvantage of being illimitable. If placing magazines before the public for sale constitutes a "waiver" of the privilege to resist a subpoena for them, the very *fact* of engaging in public criminal activity must logically accomplish the same result. The ultimate implication, of course, is that no one is ever entitled to assert the privilege under any circumstances.

Even more significantly, the "waiver" theory disregards the circumstance that compliance with the subpoena would by *itself* have constituted a testimonial or communicative act within the privilege's protection because of the witness's implicit guarantee that the maga-

zines produced were in fact those demanded. Apart from the publications' inherently communicative character, a previous public display of them could not "waive" the potentially self-incriminatory assertion inherent in the act of production itself. *Curcio v. United States*, 354 U.S. 118, 125 (1957); *United States v. Blank*, 459 F.2d 383, 385 (6 Cir., 1972); *United States v. Cohen*, 388 F.2d 464, 466 (9 Cir., 1967); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585, 590 (1926). The principle has been characterized as "universally conceded." 8 *Wigmore, Evidence* § 2264 (McNaughton rev. 1961); McCormick, *Evidence* § 126 (2nd. ed. 1972).[15]

In light of the foregoing considerations it is not particularly surprising that virtually all lower courts have assumed as a matter of course that the Fifth Amendment privilege may properly be invoked to resist compulsory production of allegedly obscene material pursuant to a subpoena duces tecum. See, *e.g., State v. Eros Cinema, Inc.*, 262 La. 706, 264 So.2d 615, 619 (1972); *People v. DeRenzy*, 275 Cal. App.2d 380, 79 Cal. Rptr. 777, 780 (1969); *Smith v. Fair*, 363 F. Supp. 1021 (N.D. Ohio, W.D., 1973); *Maley v. Meyers*, reproduced in Appendix C of this brief at pages 74-82. By implication the Texas Legislature itself recognized the applicability of the privilege when it provided in (now repealed) section 9(c) of Article 527 of the Penal Code, relating to

15. Superficially, the Court's decisions in *United States v. Dionisio*, 410 U.S. 1 (1973) and *United States v. Mara*, 410 U.S. 19 (1973), both of which sustained subpoenas requiring the production of identifying physical characteristics, might suggest a contrary result, since compliance with the subpoena was likewise a testimonial act.

The significant fact, of course, is that the testimonial assertion implicit in such compliance is in no sense actually or potentially self-incriminatory; it is, rather, "essential neutral." *California v. Byers*, 402 U.S. 424, 432 (1971).

prior adversary hearings on the issue of obscenity, that an adverse party would be *permitted* to produce the allegedly obscene material at the hearing but that under no circumstances would he be *required* to produce it.

Apparently the Respondent places almost exclusive reliance on *Anderson v. Coulter*, 108 Ariz. 388, 499 P. 2d 103 (1972), *cert. denied*, 410 U.S. 990 (1973) in support of his theory that Michael McKelva was nevertheless obligated to produce the forty-seven magazines.[16] Aside from the fact that *Anderson* is predicated exclusively upon the discredited "waiver" approach, it is factually distinguishable from the present case. While in *Anderson* the State supposedly had knowledge of the communicative content of the subpoenaed film (thereby rendering somewhat less formidable the testimonial assertion inherent in the act of compliance), the City of Temple was unable to establish such an independent evidentiary predicate. None of its witnesses had ever seen the contents of the forty-seven magazines, and none was able to describe even the *cover* of any particular magazine. The subpoena itself identified the publications only by title. Consequently, compliance under these circumstances would necessarily have authenticated the magazines as being those sought

16. The decision reversed a ruling of the Arizona Court of Appeals that found the privilege applicable to a subpoena for allegedly obscene films. *Anderson v. Coulter*, 16 Ariz. App. 27, 490 P.2d 856, 860 (1971).

Significantly, the United States District Court for the District of Arizona has effectively nullified the holding of the Arizona Supreme Court by granting habeas corpus relief to an individual held in contempt for having exercised what the District Court concluded was his right under the Fifth Amendment to resist a subpoena for an allegedly obscene film on grounds of possible self-incrimination. See *Russell v. Blubaum*, D. Ariz., July 11, 1973, reproduced in Appendix D of this brief at pages 83-87.

by the City, a type of testimonial assertion that apparently could have been provided by no one else.

The real vice of the decision in *Anderson*, however, is its supposition that there is something "illogical and irrational," 499 P.2d at 106, in according an individual the simultaneous protection of both the First and Fifth Amendments. That conclusion is premised on the altogether erroneous misconception that an individual who asserts the Fifth Amendment privilege must necessarily be guilty of a criminal offense. Yet plainly a person "may have a reasonable fear of prosecution and yet be innocent of any wrongdoing." *Slochower v. Board of Higher Education*, 350 U.S. 551, 557-58 (1956); *Ullman v. United States*, 350 U.S. 422, 426 (1956). The history of obscenity litigation has enshrined as indisputable the proposition that a distributor of books and films may entertain a realistic apprehension of criminal prosecution sufficient to support a claim of the Fifth Amendment privilege without simultaneously conceding that the material he distributes is obscene. See, *e.g.*, *Jenkins v. State*, 199 S.E.2d 183 (S.Ct. Ga., 1973), now pending on the docket of this Court as No. 73-557, *Jenkins v. Georgia*.

The entirety of the Respondent's position is an official rationalization, grounded ultimately on expediency and wholly unsupported by the history and internal logic of the Fifth Amendment. The Court has never before subjected the privilege against self-incrimination to such pragmatic considerations, and it should not do so now. "It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise." *Quinn v. United States*, 349 U.S. 155, 164 (1955).

2. An attorney who in good faith advises his client to resist compliance with a subpoena duces tecum on grounds of possible self-incrimination, and who is thereafter adjudged in contempt of court solely for "advising and counseling" the client's disobedience of the subpoena, is thereby deprived of rights guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments.

Certainly neither the Petitioner nor any other responsible member of the legal profession would contend that obedience to law is not one of the supreme virtues of life in a civilized society. The statement of the obligation as a general proposition is unexceptionable.

But a sincere and abiding respect for the rule of law by no means entails adherence to the mistaken conception that undeviating and unquestioning obedience to governmental authority is invariably a prerequisite for responsible citizenship. As an institution the Court has consistently recognized the legitimacy of nonviolent resistance to unconstitutional laws as an appropriate means of establishing their invalidity.[17] Implicit in this perspective is the recognition that in many instances the only effective technique for vindicating Federal rights entails a calculated disregard for the laws that abridge them.[18]

The Court's previous decisions thus establish uniformly that the unconstitutionality of a legislative enactment will

17. *Brown v. Louisiana*, 383 U.S. 131 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Barr v. Columbia*, 378 U.S. 146 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964); *Bouie v. Columbia*, 378 U.S. 347 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961).

18. Compare *Poe v. Ullman*, 367 U.S. 497 (1961) with *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

ordinarily constitute a complete defense to a criminal prosecution for violating it.

On the other hand, disobedience of even an unconstitutional or otherwise invalid judicial order, judgment or decree will frequently entail adverse consequences for efficient judicial administration that far outweigh any harm that might be occasioned by compliance with the order until such time as it has been subjected to the ordinary processes of appellate review. Essentially in light of this consideration, the Court has developed the principle that the invalidity of an injunctive decree, even on constitutional grounds, will normally not constitute a defense to a citation for contempt resulting from disobedience of it so long as the court had jurisdiction of the parties and subject matter of the controversy. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Howat v. Kansas*, 258 U.S. 181 (1922); *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418 (1911); *United States v. Shipp*, 203 U.S. 563 (1906); *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968). So long as effective avenues for judicial relief are established and available, there exists a continuing obligation to pursue those remedies in lieu of the alternative of self-help; it cannot be presumed in the absence of any legitimate appeal to the judiciary's corrective processes that the effort would have been unavailing. *Walker v. City of Birmingham*, 388 U.S. 307, 319 (1967).

Of necessity, however, the *Mine Workers* doctrine is premised on the implicit assumption that adherence to the traditional course of judicial review (perhaps greatly expedited, when necessary)[19] will effectively preserve and

19. See, *e.g.*, *New York Times Company v. United States*, 403 U.S. 713 (1971).

protect fundamental constitutional rights that might otherwise be impaired or destroyed by obedience to the commands of an unconstitutional judicial decree. As a matter of simple and straightforward logic, the doctrine has no application to the situation in which compliance with the order of a Judge would risk an irreparable and irretrievable surrender of a fundamental constitutional right resulting from the unavaliability of a judicial remedy for testing the legality of the order prior to the time that compliance is demanded.

Thus, in *Johnson v. Virginia*, 373 U.S. 61 (1963), the Court summarily reversed the contempt conviction that resulted when a black man disregarded a Richmond Traffic Court Judge's order to be seated in a section of the courtroom reserved for Negroes. The same result followed in *Hamilton v. Alabama*, 376 U.S. 650 (1964), *reversing* 275 Ala. 574, 156 So.2d 926 (1963), where the contempt resulted from the black Petitioner's refusal to testify as a witness during a criminal trial until the prosecutor accorded her the same courtesy he had shown to previous white witnesses by addressing her as "Miss Hamilton" rather than as "Mary." See also *Hickman v. Taylor*, 329 U.S. 495 (1947); *Gibson v. Florida Legislative Investigation Commission*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958); *cf. United States v. Cox*, 342 F.2d 167 (5 Cir., 1965), *cert. denied sub nom. Cox v. Hauberg*, 381 U.S. 935.

Each of these cases stand clearly and irrefutably for the same proposition: that an individual may choose to disobey what he regards to be an invalid or unconstitutional judicial order *if* (i) compliance with the order would risk irreparable loss of a fundamental Federal right, and (ii) the circumstances are such that no avail-

able judicial remedy exists for testing the validity of the order prior to the time that compliance with it is demanded by the Judge. Because the rationale underlying the *Mine Workers* doctrine is inapplicable in these circumstances, the doctrine itself is inapplicable. *Cf. Walker v. City of Birmingham*, 388 U.S. 307, 315 and n. 6, 318 (1967).

The refusal to comply with a judicial order to provide potentially self-incriminatory testimonial or documentary evidence despite a valid invocation of the Fifth Amendment privilege against self-incrimination is, of course, a classic exception to the *Mine Workers* rule. Since a witness who has once involuntarily disclosed the privileged information cannot thereafter retrieve it,[20] and since there are no effective remedies available to the witness for attacking a Trial Judge's ruling in a higher court before compliance is required,[21] disobedience of a judicial decree threatening an involuntary surrender of the Fifth Amend-

20. "[O]nce the witness has complied with an order to testify, he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently develops that compelling the testimony violated constitutional rights. In such a predicament, the damage is irreparable. No remedies are available which can effectively cure the constitutional deprivation after the order has been unwillingly obeyed." *United States v. Dickinson*, 465 F.2d 496, 512 (5 Cir., 1972) (footnote omitted); see also *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

21. Apparently no Texas appellate court has ever before in the history of the State entertained an application for a writ of mandamus or prohibition to compel a Judge to recognize the assertion of the Fifth Amendment privilege against self-incrimination during the pendency of a trial. In an administrative sense such a procedure would be unworkable, and in any event the time span between Michael McKelva's initial refusal to produce the magazines and the imposition of the contempt judgment was only a few hours. Even if some remedy had been available in theory, it would have been futile to pursue it (see Appendix B of this brief).

ment privilege has always been regarded as an appropriate means of resolving the matter in another forum, and in this situation, quite obviously, the constitutional invalidity of the order will result in the reversal of a conviction for contempt. *Quinn v. United States*, 349 U.S. 155 (1955); (*Patricia*) *Blau v. United States*, 340 U.S. 159 (1950); (*Irving*) *Blau v. United States*, 340 U.S. 332 (1951).

Despite the foregoing considerations, the Respondent nevertheless continues to maintain the totally untenable position that a witness adjudged in contempt of court for having declined to obey a Trial Judge's order to waive a claim to the Fifth Amendment privilege cannot thereafter assert the constitutional invalidity of the order as a basis for setting aside the contempt judgment. Apparently the Respondent regards Judge Clawson's ruling on the issue as having concluded the matter.

The Respondent's persistent adherence to the theory presumably arises from Judge Clawson's misconception that a witness ordered by a court to produce potentially self-incriminatory testimonial or documentary evidence is obligated to comply with that order and *thereafter* to seek vindication of his Fifth Amendment rights by moving to exclude the illegally obtained evidence from any resulting criminal prosecution (A. 32). The argument seems to be premised on the assumption that, just as the courts must initially undertake the responsibility for determining the admissibility of evidence obtained by police and prosecutors in violation of the Fourth and Fifth Amendments, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966), so they must also have the authority to determine the admissibility of *any* evidence for which the Fifth Amendment privilege is claimed, thereby necessitating the production of such

evidence in order that the Judge may satisfy himself that it is, in fact, actually or potentially self-incriminatory.

The implications of this argument are remarkable.

First, its acceptance would effectively destroy the invocation of the privilege. If after-the-fact suppression of incriminating evidence in a subsequent criminal prosecution were sufficient to preserve Fifth Amendment rights, no witness would ever be entitled to assert them.

Secondly, the argument renders academic an issue that has only recently divided the Court: whether statutes conferring immunity from criminal prosecution must provide transactional, rather than use or derivative use, immunity in order to satisfy minimum Fifth Amendment standards. From the Respondent's perspective, *no* grant of immunity is necessary; all that is constitutionally required is that the witness be provided with an opportunity to move for the exclusion of the illegally obtained evidence after he has been brought to trial on the basis of it. (Certainly the Respondent must find regrettable the Court's inability to perceive this truth before it went to the trouble of deciding *Kastigar v. United States*, 406 U.S. 441 (1972) and *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472 (1972)).

Finally, since Judge Clawson was supposedly entitled to look behind the assertion of the privilege in order to determine for himself whether the production of the forty-seven magazines would have violated Michael McKelva's Fifth Amendment rights, he must necessarily have been authorized to determine whether the witness's testimony was constitutionally protected by demanding that he testify. In conjunction with his earlier confusion regarding the implications of the *Mine Workers* doctrine,

the Respondent is thus contending that all individuals asserting the Fifth Amendment privilege must waive it on demand of a Judge, a refusal to do so being punishable by a judgment of criminal contempt against their lawyers, the validity of which is unassailable despite the unconstitutionality of the order from which it resulted.

Even apart from its draconian consequences, this approach has been nullified by more than a century and a half of constitutional litigation under the Fifth Amendment. Beginning with Chief Justice Marshall's decision in *United States v. Burr*, F. Cas. No. 14692e, p. 40 (C.C. Va., 1807), through *Boyd v. United States*, 116 U.S. 616 (1886); *Ballmann v. Fagin*, 200 U.S. 186, 195 (1906), and *Arndstein v. McCarthy*, 254 U.S. 71, 73 (1920), culminating in *Hoffman v. United States*, 341 U.S. 479, 488 (1951), the Court has consistently recognized[22] that requiring a witness to demonstrate his entitlement to the privilege would result in precisely the sort of potentially self-incriminatory disclosure which it is the object of the Fifth Amendment to interdict.[23] The invocation of the privilege *must be sustained* unless it is *perfectly clear*, from a careful consideration of all the surrounding circumstances, that the testimonial disclosure *cannot possibly* have a tendency to incriminate the witness. "If, in such

22. With the apparent exception of the ill-considered *dictum* in *Consolidated Rendering Company v. Vermont*, 207 U.S. 541, 552-53 (1908), repeated in *Brown v. United States*, 276 U.S. 134, 144 (1928). Since neither of these cases recognized the witness's entitlement to the Fifth Amendment privilege, they cannot be regarded as contrary authority.

23. "[I]f the witness, upon interposing his claim, were required to prove the hazard [of self-incrimination] in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman v. United States*, 341 U.S. at 486.

a case, [the witness says] upon his oath that his answer would criminate himself, the court can demand no other testimony of the fact." *United States v. Burr, supra.*

Not one of the Court's previous decisions has ever suggested the propriety or desirability of imposing a prophylactic exclusionary rule on evidence illegally obtained by *Judges* in order to preclude the exercise of the Fifth Amendment privilege. The utilization of that technique in the context of *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Miranda v. Arizona*, 384 U.S. 436 (1966) is obviously the product of little more than the judiciary's practical inability to interdict violations of Fourth and Fifth Amendment rights *before they occur*.[24] The same considerations are hardly relevant when the potential victim and his attorney can invoke established judicial processes to prevent altogether any sort of compulsory testimonial disclosure.

The fundamental flaw in the Respondent's position is attributable to the misconception that the exclusion of evidence illegally obtained by a Judge over a witness's invocation of the Fifth Amendment privilege is the functional equivalent of a grant of use and derivative use immunity under the standards prescribed by *Kastigar* and *Zicarelli*. Clearly it is not. When a State confers before-the-fact immunity from criminal prosecution in exchange

24. In a similar sense the Court has felt compelled "to accomodate the interests of the State and Federal Governments in investigating and prosecuting crime" by prohibiting Federal use or derivative use of evidence obtained by State officials following a grant of immunity from State criminal prosecution. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79-80 (1964). It has declined to adopt a suggested exclusionary rule when such competing policy considerations have not been compelling. *Marchetti v. United States*, 390 U.S. 39, 58-60 (1968).

for involuntary testimonial disclosures, that juridical act *automatically* bars the utilization of such evidence against the witness in any subsequent State or Federal criminal prosecution. An exclusionary rule would not preclude the use of the evidence if the State courts were ultimately to conclude that the compulsory disclosure was not within the Fifth Amendment privilege, which was apparently the position of both the Trial Judge and the Supreme Court of Texas in the present case. Consequently, the Respondent's approach would leave the witness vulnerable to a criminal prosecution and conviction based upon illegally obtained evidence, perpetuated by the refusal of the State courts to concede that the evidence was, in fact, illegally obtained. The mere existence of an ultimate Federal remedy for that judicial error simply cannot realistically be equated with a grant of immunity.

Nor can it be seriously argued that this Court should formulate a rule that would meet the foregoing objections by requiring a witness to comply with a State Court's demand for potentially self-incriminatory testimonial disclosures so long as no use or derivative use were made of the evidence obtained *regardless* of the witness's entitlement to the protection of the Fifth Amendment privilege. Such an approach would amount to nothing less than judicial enactment of the immunity statute that the Texas Legislature has thus far declined to adopt and an unprecedented assumption of a legislative prerogative that, under established principles of Federalism and comity, has traditionally been consigned to the States.

In view of the foregoing considerations, Michael McKelva was plainly entitled to avoid the risk of an irrevocable and irretrievable surrender of his Fifth Amendment rights by refusing to produce the forty-seven magazines. The

critical issue is whether his attorney was entitled in good faith to advise and counsel that course of action.

Apparently no reported precedent in our constitutional history even remotely suggests that he was not. There have, of course, been numerous judicial decisions holding or implying that an attorney may properly be adjudged in contempt for counseling disobedience of other sorts of court orders or decrees not entailing such spectacular hazards for the constitutional rights of those affected by them.[25] In those circumstances the implicit premise of our judicial system has been that the proper procedure for correcting such defective orders, even if their invalidity is of constitutional proportions, is by appeal to the judicial process itself, not by resort to a species of self-help that places the attorney and his client above the law. *Fisher v. Pace*, 336 U.S. 155, 162 (1949); *cf. New York Times Company v. United States*, 403 U.S. 713 (1971). When a lawyer precipitously by-passes available judicial remedies and casually usurps the functions of a Judge, there is little reason in principle for exempting him from the same consequences that are likely to befall his client. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).[26]

25. *In re Bongfeldt*, 22 Cal. App. 3d 465, 99 Cal. Rptr. 428, 435 (1972) (dictum); *Petition of Green*, 172 Ohio St. 269, 175 N.E.2d 59, 62-63 (1961), *revd. on other grounds*, 369 U.S. 689 (1962); *Holt v. McLaughlin*, 357 Mo. 844, 210 S.W.2d 1006 (1948); *Schmidt v. United States*, 115 F.2d 394, 396 (6 Cir., 1940) (dictum); *Leber v. United States*, 170 F. 881, 889-90 (9 Cir., 1909); *In re Noyes*, 121 F. 209 (9 Cir., 1902); *Anderson v. Comptois*, 109 F. 971, 974 (9 Cir., 1901); *People ex rel. Alexander v. District Court of Tenth Judicial District*, 29 Colo. 182, 68 P. 242, 263 (1901).

26. Even this concession may not be altogether warranted. Under long-established Texas law a person may not be adjudged in contempt for having refused to obey an order that the Court had no power or authority to enter, *Ex parte Davis*, 171 Tex. Cr. R. 629, 353 S.W.2d 29 (1962); *Ex parte Lillard*, 159 Tex. 18, 314 S.W.2d 800, 806 (1958), a rule contrary to that recognized by Alabama in *Walker v. City of Birmingham*, 388 U.S. at 319-20.

If the courts of a State are prepared to recognize the constitutional invalidity of a judicial decree as a viable defense in contempt proceedings resulting from disobedience of it, all relevant considerations may very well justify according an attorney absolute immunity for advice given in good faith. See, in this regard, *Thomas v. Collins*, 323 U.S. 516, 522 (1945), a decision not discussed or even cited in *Walker v. City of Birmingham*.

Obviously the matter is altogether different when an attorney and his client are confronted with a Judge's demand that they desist immediately from asserting what they believe in good faith to be the client's Federal constitutional rights under the Fifth Amendment. Effective judicial review of the order is impossible if involuntary compliance is forthcoming. If the client's privilege against self-incrimination is to be preserved intact, disobedience is not merely one alternative; it is the *only* alternative. The witness's dilemma is compounded by the fact that, because of no more than the Trial Judge's hostility or insensitivity to his invocation of the privilege, he may ultimately go to jail for having exercised one of his most fundamental constitutional rights. It is little comfort that coercive confinement of a recalcitrant witness for *civil* contempt, with a provision that he may subsequently purge himself by providing the information if his claim of the privilege is ultimately rejected by higher courts, is a practical necessity because of the unavailability of any workable alternative for compelling compliance that has been lawfully demanded.[27]

27. The resulting hardship for Texas witnesses has been ameliorated to some extent by the Fifth Circuit's decision in *Dawkins v. Crevasse*, 391 F.2d 921 (5 Cir., 1968).

Unfortunately, the inability of the Supreme Court of Texas to perceive the inequity resulted in Michael McKelva serving seven days in the Bell County Jail until, in the face of impending relief from a United States District Court, he was ultimately released "for good behavior."

On the other hand, threatening a witness *and his attorney* with *criminal* contempt sanctions (that in Texas may range up to six months in jail and a $1,000.00 fine under Article 1911a) plainly has an appreciable tendency to coerce an involuntary waiver of the privilege by a witness who, while honestly believing that his invocation of the Fifth Amendment is justified, is nevertheless reluctant to risk such severe penalties because of fear that he may ultimately turn out to have been mistaken. Such a threat renders continued reliance on the privilege "costly" in precisely the sense condemned by the decisions of this Court. *Spevack v. Klein*, 385 U.S. 511, 515 (1967); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Slochower v. Board of Education*, 350 U.S. 551, 557-58 (1966).

Conceivably both an attorney and his client *might* be subject to punishment for criminal contempt if the circumstances under which the privilege were asserted were sufficient to establish beyond a reasonable doubt that the Fifth Amendment was being utilized merely as a transparent shield for the obstruction of justice. Thus, if a witness at the instigation of his lawyer continues to rely on the privilege following a valid grant of use and derivative use immunity satisfying the standards of *Kastigar v. United States*, 406 U.S. 441 (1972), and if they refuse to offer any plausible justification for such continued recalcitrance,[28] then presumably a Trial Judge *might* be justified in concluding that such willful resistance

28. For example, a realistic and substantial risk of self-incrimination and subsequent criminal prosecution under the laws of a foreign jurisdiction. See *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972).

to judicial authority could properly be punished as a criminal contempt. Of course, in such circumstances an attorney would not be acting to preserve his client's constitutional rights but simply to thwart legitimate official inquiry.

But plainly this is not such a case. On the record the Petitioner's good faith is unassailable, and there is not the slightest evidence of the contumacious intent that has traditionally been regarded as essential to the imposition of a valid judgment of criminal contempt.[29] "Knowledge that one's act is wrongful and a purpose to nevertheless do the act are prerequisites to criminal contempt as to most other crimes. *Good faith* pursuit of a plausible though mistaken alternative is antithetical to contumacious intent, however unimportant it may be in the context of civil contempt." *In re Brown*, 454 F.2d 999, 1007 (D.C. Cir., 1971) (footnote omitted; emphasis added); *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947); *Nilva v. United States*, 352 U.S. 385, 395 (1957); *Wilson v. North Carolina*, 169 U.S. 586, 600 (1898); *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir., 1971).

Of course, the fact that an attorney's conduct is "clearly blameworthy," *Offutt v. United States*, 232 F.2d 69, 72 (D.C. Cir., 1956), may in and of itself provide sufficient evidence of contumacious intent. On the other

29. For that matter, in light of Judge Clawson's conclusion that the witness's failure to produce the forty-seven magazines was equivalent to an admission of their obscenity (A. 23), it is hardly plausible to assume that he could have regarded the Petitioner's advice to his client as a realistic threat to the administration of justice. *Holt v. Virginia*, 381 U.S. 131, 135, n. 2 (1965); *cf. Brown v. United States*, 356 U.S. 148, 153 (1958) ("Trial courts * * * must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice").

hand, if a lawyer is justified in the reasonable, good-faith belief that his advice to his client is neither wrongful nor blameworthy but rather is essential to prevent risk of an involuntary, ill-considered waiver of a fundamental constitutional right, that advice alone does not meet the minimum requirement of "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States v. Seale,* 461 F.2d 345, 367 (7 Cir., 1972).

Recognition of the foregoing principle is reflected by the Code of Professional Responsibility of the American Bar Association, adopted in section 8 of the Rules of the State Bar of Texas. Thus, Disciplinary Rule 7-102(A)(7) provides that in his representation of a client an attorney shall not "counsel or assist his client in conduct that the lawyer *knows* to be illegal or fraudulent" (emphasis added). By necessary implication an attorney may properly counsel a course of action that he believes in good faith to be necessary for the preservation of his client's constitutional rights.

Likewise, under the following subprovision of the same rule, a lawyer may not "*knowingly* engage in other illegal conduct, or conduct contrary to a Disciplinary Rule" (emphasis added). And, along somewhat the same line, Ethical Consideration 7-27 points out that "a lawyer should not suppress evidence that he or his client has a legal obligation to produce." Obviously, if any attorney reasonably believes that his client is *not* obligated to forego reliance on the Fifth Amendment privilege simply because a Judge demands that he do so, neither of these provisions prohibits an attorney from advising and counseling continued resistance.

Finally, Ethical Consideration 7-22 provides: "Respect for judicial rulings is essential to the proper administration of justice [a proposition which the Petitioner and this Court have consistently recognized]; *however,* a litigant or his lawyer may, *in good faith and within the framework of the law,* take steps to test the correctness of a ruling of the tribunal" (emphasis added). Since "taking steps to test" a court's ruling (by way of appeal, habeas corpus, mandamus and so on) is ordinarily so manifestly permissible as not to require explicit approval, this provision sanctions precisely what was done in the present case: combined, good-faith resistance to a judicial order by a witness and his attorney, designed solely to avert the risk of an irrevocable surrender of Fifth Amendment rights under circumstances which necessarily precluded before-the-fact judicial review. "Within the framework of the law" Michael McKelva chose the only feasible course for testing the validity of Judge Clawson's order—he refused to comply with it.

All of this traditional wisdom and the consequences it implies were succinctly spelled out by the Court's opinion in *In re Watts,* 190 U.S. 1, 29 (1903), where

> "the essence of the alleged contempt was that, assuming [the client's] action was taken pursuant to the advise of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts *in good faith* and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule" (emphasis added).

See also *United States ex rel. Lynch v. Werksman,* 319 F. Supp. 353, 355 (N.D. Ill., E.D., 1970). Particularly in view of the fact that the legitimacy of the Petitioner's advice was subsequently confirmed by three United States District Courts, *Smith v. Fair,* 363 F. Supp. 1021 (N.D. Ohio, W.D., 1973); *Maley v. Meyers* (W.D. Tex., December 11, 1973) [Appendix C of this brief]; *Russell v. Blubaum* (D. Ariz., July 11, 1973) [Appendix D of this brief]; it can hardly be suggested that he was acting in bad faith.

* * *

The dual allegiance owed by an attorney to the courts he serves and to the clients whose interests he represents creates a paradox of unsettling proportions within the context provided by the Fifth Amendment. As an officer of the court, he is professionally obligated to respect the rule of law and its implementation through the exercise of judicial authority. But he is equally committed to preserving inviolate the privilege against self-incrimination and to advising his client in a manner that will accomplish that result.

In the circumstances of the present case, our constitutional history rejects the suggestion that the place of a conscientious advocate was on the side of the Judge. Contemporary concern for Fifth Amendment values has focused for the most part on the conduct of the police. *Miranda v. Arizona,* 384 U.S. 436 (1966). But it cannot be forgotten that the common law antecedents of the privilege against self-incrimination evolved not from the abuses of sheriffs and constables but from the excesses of over-zealous ecclesiastical and administrative tribunals —principally the High Commission and Court of Star

Chamber—whose *Judges* habitually adopted the simple expedient of compelling the witnesses before them to provide evidence of their own guilt.[30] As a consequence, the recognition of the privilege arose primarily from a desire to curb and restrain a particular sort of illegitimate judicial inquiry—precisely the sort that was attempted here.

Because the Fifth Amendment reflects "many of our fundamental values and most noble aspirations," *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964), and particularly because the privilege against self-incrimination "insists upon the equality of the individual and the state," *In Re Gault,* 387 U.S. 1, 47 (1967), the Court has recognized that the right to effective assistance of counsel, *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932), dictates that attorneys be accorded the primary responsibility for preserving the privilege, even before the inception of formal criminal proceedings. *Kirby v. Illinois,* 406 U.S. 682, 688 (1972); *Miranda v. Arizona,* 384 U.S. 436, 460-61 (1966). Taken together the Fifth and Sixth Amendments reinforce each other; the resistance to official compulsion they contemplate can hardly be characterized as illegitimate simply because the coercion is judicial in origin.

Of course, no specific provision of the Constitution establishes the right of an attorney to counsel resistance to judicial decrees that threaten his client's Fifth Amendment privilege, just as there is no explicit guarantee of a lawyer's right to file a motion to disqualify a Judge, *Holt v. Virginia,* 381 U.S. 131 (1965) or of his right to make vigorous and even heated objections. *In re*

30. *DeLuna v. United States,* 308 F.2d 140, 144-50 (5 Cir., 1962); II Schwartz, *A Commentary On the Constitution of the United States* 818 (1968).

McConnell, 370 U.S. 230, 236 (1962). The right arises from the entire spectrum of constitutional values implicit in the Fifth and Sixth Amendments; from the Ninth Amendment's reservation "to the people" of unenumerated substantive rights, the existence and recognition of which are necessary concomitants of other rights specifically enumerated, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and from the guarantee of "liberty" preserved by the due process clause of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). The right exists, not for the personal gain or benefit of the legal profession, but because "its existence is necessary in making * * * express guarantees fully meaningful." *Griswold v. Connecticut*, 381 U.S. at 483.

If Michael McKelva had complied with Judge Clawson's order to produce the forty-seven magazines, he would have been conceding to that Judge the final authority for determining his entitlement to the protection of the Fifth Amendment privilege against self-incrimination. Yet responsibility for the *final* resolution of any constitutional question has always rested with this Court, *Marbury v. Madison*, 1 Cranch 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958), just as the decision to assert or to waive Fifth Amendment rights has traditionally been the prerogative of the individual, assisted by his attorney. Questions as momentous as these could not have been resolved in any other manner.

Because the totality of our collective experience under the Fifth and Sixth Amendments vindicates the action taken by the Petitioner, the judgment of criminal contempt against him cannot stand.

CONCLUSION

For the foregoing reasons the Petitioner respectfully suggests that the judgment of criminal contempt should be reversed and the Petitioner ordered discharged.

Respectfully submitted,

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Counsel for the Petitioner

June 1974

Of Counsel:

MICHAEL ANTHONY MANESS
Houston, Texas

APPENDIX A

The Constitution of the United States:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

Amendment IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment XIV

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * * *"

Article 527, Texas Penal Code (1974 Supplement):

Text of article effective until January 1, 1974

Definitions

Section 1. As used in this Article:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(D) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(E) "Distribute" means to transfer possession of, whether with or without consideration.

(F) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

* * *

General sale or distribution, etc., of obscene matter: penalty

Sec. 3. Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares for distribution, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.

* * *

Sec. 8. (A) Every person who violates Section 3 is punishable by a fine of not more than $1,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense. not to exceed $10,000, or by confinement in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such

basic maximum and additional days not to exceed 360 days in the county jail, or by both fine and confinement. If such person has previously been convicted of a violation of this Act, a violation of Section 3 is punishable as a felony and by a fine of not more than $2,000 plus $5 for each additional unit of material coming within the provisions of this Act, which is involved in the offense, not to exceed $25,000, or by imprisonment in the penitentiary for not exceeding five years or both fine and imprisonment.

* * *

Search warrant for seizure of obscene material

Sec. 9. (a) An affidavit for a search warrant shall be filed with the magistrate describing the matter sought to be seized in detail. Where practical, the matter alleged to be obscene shall be attached to the affidavit for search warrant so as to afford the magistrate the opportunity to examine such material.

(b) Upon the filing of an affidavit for a search warrant, the magistrate shall determine, by examination of the matter sought to be seized, if attached, by an examination of the affidavit describing the matter, or by such other manner or means that he deems necessary, if probable cause exists for a hearing upon the question of the issuance of a search warrant. If the magistrate determines that probable cause exists for a hearing, he shall issue notice to the person or persons in possession of the matter, setting a time and place for a hearing to determine if a search warrant shall issue.

(c) The hearing on the affidavit for the issuance of a search warrant shall be at such time and upon such

reasonable notice given in such manner as the magistrate may direct. The magistrate's order as to notice and hearing shall give the adverse party the right to appear and produce the matter described in the affidavit for a search warrant, but shall not in any manner require him to produce the said matter.

* * *

Enforcement by injunction, etc.

Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the sheriff of the county in which the action was brought any obscene matter in his possession and such sheriff shall be directed to seize and destroy such matter.

* * *

City of Temple, Texas Municipal Obscenity Ordinance:

AN ORDINANCE PROHIBITING INDECENCY AND OBSCENITY IN A PUBLIC PLACE; PROHIBITING INDECENT EXPOSURE, PUBLIC NUDITY, DISPLAYING NUDE PICTURES IN PUBLIC; MAKING IT UNLAWFUL FOR A PERSON TO DISGUISE HIS TRUE SEX; AND PROHIBITING A PERSON FROM URINATING OR DEFECATING IN A PUBLIC PLACE; AND MAKING IT UNLAWFUL FOR A PERSON TO KNOWINGLY ENTER THE RESTROOM FOR THE OPPOSITE SEX; PROVIDING DEFINITIONS; PROVIDING PENALTIES; PROVIDING A SEVERABILITY CLAUSE; AND DECLARING AN EMERGENCY.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF TEMPLE, TEXAS, THAT:

* * *

SECTION 8: Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into the City of Temple for sale or distribution, or in the City of Temple prepares for sale or distribution, publishes, prints, exhibits, distributes, sells, or offers to distribute or sell, or has in his possession with intent to distribute or sell or to exhibit or offer to distribute or sell, any obscene matter is guilty of a misdemeanor.

SECTION 9: DEFINITIONS:

(A) "Obscene" material means material (a) the dominant theme of which, taken as a whole, appeals to a

prurient interest; (b) which is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) which is utterly without redeeming social value.

(B) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other articles, equipment, machines or materials.

(C) "Person" means any individual, partnership, firm, association, corporation or other legal entity, or any agent or servant thereof.

(D) "Knowingly" means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(E) "Prurient interest" means a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters. If it appears from the character of the material or the circumstances of its dissemination that the subject matter is designed for a specially susceptible audience, the appeal of the subject matter shall be judged with reference to such audience.

SECTION 10: Any person who violates any provision of Sections 1-9, shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine

not to exceed Two Hundred Dollars ($200.00). Each separate violation shall be treated as a separate offense.

* * *

SECTION 12: There exists a public emergency requiring that this ordinance be passed finally on the date of its introduction, and the Mayor having in writing declared the existence of such emergency and requested such passage, this ordinance shall be passed finally on the date of its introduction, this 19th day of October, 1972, and shall take effect immediately upon its passage and approval by the Mayor.

PASSED AND APPROVED this 19th day of October, 1972.

THE CITY OF TEMPLE, TEXAS

By: /s/ JAMIE H. CLEMENTS
Jamie H. Clements, Mayor

APPROVED AS TO FORM:

/s/ WILLIAM T. WILSON
William T. Wilson, City Attorney

ATTEST:

/s/ C. L. KEATON
C. L. Keaton, City Secretary

APPENDIX B

SUPREME COURT OF TEXAS

February 2, 1973

No. B-3821
Ex Parte) Habeas Corpus
Michael McKelva)

Relator's petition for writ of habeas corpus, filed herein this day, having been duly considered, it is ordered that said petition be, and hereby is, denied pending further information to complete the record.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the order of the Supreme Court of Texas in the case of Ex Parte Michael McKelva, Habeas Corpus, as such order appears in the minutes of said Court under the date of February 2, 1973.

IN TESTIMONY WHEREOF, Witness my hand and the Seal of the Supreme Court of Texas, at the City of Austin, on this 2nd day of February, 1973.

GARSON R. JACKSON, Clerk

By Eugene Cervenka, Deputy

* * *

SUPREME COURT OF TEXAS

ORDER OF THE COURT

B-3823
Ex parte Michael McKelva

Petition for writ of habeas corpus is this day denied.

By the Court
In Chambers
February 5, 1973

I, Garson R. Jackson, Clerk of the Supreme Court of Texas do hereby certify that the above is a true and correct copy of order of the Supreme Court of Texas with reference to the case of EX PARTE MICHAEL McKELVA, No. B-3823, original habeas corpus.

In testimony whereof, witness my hand and the seal of the Supreme Court of Texas at the City of Austin on this 5th day of February, 1973.

Garson R. Jackson, Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. W-73-CA-6

MICHAEL McKELVA, Petitioner

v.

LESTER GUNN, as Sheriff of Bell County, Texas, Respondent

ORDER TO SHOW CAUSE

A verified application for the writ of habeas corpus having been filed with the Court pursuant to 28 U.S.C. § 2241 *et seq.* on behalf of Michael McKelva, hereinafter called Petitioner, and it appearing to the Court from the matters contained in the application that an order should be issued directing the Respondent Lester Gunn, as Sheriff of Bell County, Texas, to appear by counsel and to show cause why the writ of habeas corpus should not be granted and the Petitioner ordered discharged from custody,

IT IS ACCORDINGLY ORDERED that Respondent appear by counsel before this Court at the United States Courthouse in Austin, Texas, on the 9th day of February, 1973, at 1:30 p.m., or as soon thereafter as counsel can be heard, then and there to show cause, if any there be, why the writ of habeas corpus should not be granted and the Petitioner ordered discharged from custody.

IT IS FURTHER ORDERED that counsel for the Respondent, at or before the time of hearing, file with the

Clerk of the Court a response to the application filed herein and serve a copy of such response upon counsel for Petitioner.

IT IS FURTHER ORDERED that service of a copy of this order, together with copies of the application for the writ of habeas corpus and memorandum brief in support thereof, be made forthwith in any manner authorized by the Federal Rules of Civil Procedure upon the Respondent and upon the Attorney General of Texas in accordance with 28 U.S.C. § 2252.

Done at Austin, Texas, on this 8th day of February, 1973.

JACK ROBERTS
Jack Roberts
United States District Judge

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-6

MICHAEL McKELVA, Petitioner

v.

LESTER GUNN, as Sheriff of Bell County, Texas, Respondent

ORDER

On this 9th day of February, 1973, came on to be heard Respondent's Motion to Dismiss, and it appearing to the Court that there is now no case or controversy and that all issues in this cause are moot, and that accordingly such Motion should be granted, it is hereby

ORDERED AND DECREED that Respondent's Motion to Dismiss is granted.

Entered this 9th day of February, 1973,

JACK ROBERTS
Jack Roberts
District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-87

KARL A. MALEY

v.

THE HONORABLE JAMES R. MEYERS

MEMORANDUM OPINION AND ORDER

Came on this day for consideration by the Court the petition of Karl A. Maley for writ of habeas corpus. Petitioner is an attorney who has been held in contempt of court for an incident arising from his representation of Mike McKelva, operator of Mike's News Stand, a distributor of predominantly pornographic materials in Temple, Texas. All State remedies presently available to Petitioner have been exhausted, in that the Texas Supreme Court and Court of Criminal Appeals have declined to grant relief. Petitioner has clearly manifested his intention not to pay the $500 fine assessed against him, and to go to jail if necessary. The "restraint" requirement of 28 U.S.C. § 2254 is satisfied in that Petitioner is on bond and will, according to Judge Meyers' order, go to jail upon refusal to pay the fine. *Marden v. Purdy*, 409 F.2d 784 (5th Cir. 1969). Judge Meyers has allowed Petitioner to remain free on personal recognizance bond pending the outcome of this collateral attack.

In early 1973, the City of Temple filed a civil proceeding to enjoin McKelva from distributing some 52 allegedly obscene magazines. The City issued a subpoena duces tecum directing McKelva to produce the 52 magazines for trial. While the injunction proceeding was, of course, civil in nature, McKelva would be subject to criminal prosecution under Article 527 of the Texas Penal Code upon a showing that the magazines he had exhibited and distributed were "obscene" within the meaning of that article. The question of the magazines' "obscenity" was likewise the critical issue in the injunction proceeding. At the injunction hearing, McKelva announced that he did not have five of the magazines, and filed a motion to quash the subpoena as to the remaining 47 publications. The motion was overruled by the trial judge, The Honorable J. F. Clawson of the 169th Judicial District Court of Bell County, who directed McKelva to produce the magazines within three hours.

When court reconvened three hours later, McKelva announced that he would not produce the magazines upon the advice of counsel that his right against self incrimination would be endangered by production of the evidence. Thereupon, Judge Clawson found McKelva in contempt for refusing to obey the subpoena and found his lawyers including Petitioner, guilty of contempt for advising and counseling McKelva not to obey the subpoena. Petitioner invoked his right, as an officer of the court, under TEX. REV. CIV. STAT. ANN. art. 1911a(2)(c), to be tried by a judge of a district court other than the offended court. Respondent was duly appointed for that purpose by the presiding judge of the Third Administrative Judicial District. Petitioner was subsequently tried before

Judge Meyers and found guilty of contempt. A $500 fine was assessed as punishment.

We begin our analysis by noting that the finding of contempt was in no way based upon any allegation of disrespectful or disruptive conduct by Petitioner, nor upon any failure to obey a court order directed to him. Rather, the contempt consisted of advising and counseling a client that his constitutional rights would be endangered by obeying a court order. Since the finding of Petitioner's contempt rests upon the proposition that he advised and counseled his client to perform an act of contempt, we must necessarily examine the propriety of the underlying assumption that McKelva's refusal to produce the magazines was contemptuous.

Even incorrect court orders must ordinarily be obeyed until set aside. The Fifth Circuit has held that an unconstitutional court order must be obeyed if: 1) the court has subject matter and personal jurisdiction; 2) adequate and effective remedies are available for orderly review of the challenged ruling; and 3) the order does not require an irretrievable surrender of constitutional guarantees. *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972).

In this case, however, the order for McKelva to obey the subpoena duces tecum required the irretrievable surrender of a constitutional right, with no adequate and effective remedies being available for the orderly review of the challenged ruling. McKelva and his attorney had "no real opportunity to contest the unconstitutional order," *Id.* at 511. The choice had to be made on the spot, in the courtroom, whether to obey or disobey Judge Clawson's order. No immediate opportunity was avail-

able for appellate review of the order. Rather, McKelva's choice was either to refuse to obey the order or to be compelled to be a witness against himself, in violation of the Fifth Amendment.

> (I)t is obvious that if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power. For example, a witness cannot be punished for contempt of court for refusing a court order to testify if the underlying order violates Fifth, Fourth or perhaps First Amendment rights. . . . (O)nce the witness has complied with an order to testify he cannot thereafter retrieve the information involuntarily revealed, even if it subsequently developed that compelling the testimony violated constitutional rights.

Id. at 512.

Thus, the right against self incrimination is a right so vital and basic to our system of justice that the contempt power may not be invoked against one who disobeys a court order which would violate his Fifth Amendment rights. If Judge Clawson's order violated McKelva's Fifth Amendment rights, as we conclude it did, Petitioner was fully justified in advising his client of that fact. Indeed, for Petitioner to do otherwise would be contrary to the vigorous representation contemplated by the Sixth Amendment's guarantee of the right of an accused "to have the Assistance of Counsel for his defence."

In concluding that the underlying order for McKelva to obey the subpoena duces tecum contravened the Fifth Amendment, we find that the right against self incrimination extends to this situation involving a civil injunction proceeding, and that McKelva did not waive his Fifth

Amendment rights by offering the magazines for public sale. A subpoena duces tecum cannot be used to circumvent the Fifth Amendment protection against self incrimination. This is so although the proceeding is civil in form. In the leading case of *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court held that the right against self incrimination extends to forfeiture proceedings which, " . . . though they may be civil in form, are in their nature criminal." *Id.* at 634. The Supreme Court has recently reaffirmed that the right against self incrimination

> . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.

Kastigar v. United States, 406 U.S. 441, 444-45 (1972). *See also, United States v. United States Coin & Currency*, 401 U.S. 715 (1971); *In re Gault*, 387 U.S. 1 (1967); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). In the present case, McKelva was fully justified in a reasonable belief that evidence obtained could be used against him in a criminal prosecution. Indeed, McKelva had previously been prosecuted in municipal court for violation of the Temple obscenity ordinance. (See this Court's Memorandum Opinion and Order in *McKelva v. The City of Temple*, Civil Action No. W-73-CA-10 (March 28, 1973).) No offer of immunity was made to McKelva. The civil injunction proceeding against McKelva was authorized by the same Article 527 of the Texas Penal Code which declares the exhibition and distribution of obscene matter to be a criminal offense. Civil and criminal liability arise from the same act. It follows that the right against self incrimination applies whether the proceeding be civil or criminal in form.

Respondent contends that McKelva waived his Fifth Amendment rights by offering the magazines for public sale. While the Fourth Amendment basically protects the right of persons to rely upon a reasonable expectation of privacy, *Katz v. United States*, 389 U.S. 347 (1967), the Fifth Amendment protects not privacy, but the accused's "freedom to decide whether to assist the state in securing his conviction." *In re Gault* 387 U.S. 1, 47 (1967). The fact that the magazines were offered for sale is no more relevant in the context of this case than would be the fact that narcotics had been offered for sale, were a subpoena duces tecum issued for such contraband, or that a defendant had publicly made a res gestae admission, were he compelled to take the stand and repeat his statement. The Fifth Amendment leaves no room for such prosecutorial short-cuts. The fact that a suspect voluntarily makes incriminating evidence publicly available does not mean that he may be involuntarily compelled to convict himself by producing that evidence in court, but rather means simply that he cannot object when such evidence is properly gathered by law enforcement authorities for use against him.

While we thus reject the reasoning of *Anderson v. Coulter*, 499 P.2d 103 (Ariz. 1972), upon which Respondent heavily relies, we further note that this case is factually distinguishable from *Anderson*. The evidence in *Anderson* had previously been fully examined and described by police officers, and the court could state confidently:

> It is obvious that the prosecution had everything it needed to identify the film and compliance with the subpoena duces tecum did no more than produce the film already known by both the prosecution and the court to exist.

Id. at 106. In the present case, the magazines sought were listed in the subpoena because they were on a list of suspected obscene magazines. The list was compiled by a Temple police officer during the course of his investigation of Mike's News Stand. Magazines were placed on the list upon the basis of the officer's observation of their partially concealed covers. The officer did not examine the contents of the magazines, and could not describe with particularity the cover of any of them. Thus, clearly the subpoena duces tecum in this case was designed to accomplish more than a " 'trivial degree of incrimination.' " *Id.* Rather, the magazines sought were the critical evidence in any effort to make a case against McKelva. Nor can it be said that producing the magazines would be a non-communicative act such as submission to a blood test, *Schmerber v. California,* 384 U.S. 757 (1966), giving a handwriting exemplar, *Gilbert v. California,* 388 U.S. 263 (1967), speaking and appearing in a police lineup, *United States v. Wade,* 388 U.S. 218 (1967), or stopping to give one's name and address after an automobile accident, *California v. Byers,* 402 U.S. 424 (1971). The magazines here were not sought for an "essentially neutral" purpose of identification, and were not "real or physical evidence" taken from the suspect's body. Rather, the subpoena sought to have McKelva gather as evidence the magazines, which were sought for their "communicative" or "testimonial" value.

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

Schmerber, supra at 763-64.

Thus, we conclude that the underlying order for McKelva to obey the subpoena duces tecum called for the irretrievable surrender of constitutional guarantees, and that Petitioner was only acting to protect the rights secured his client by the Fifth and Sixth Amendments to the Constitution. For this he cannot be held in contempt. It is accordingly

ORDERED, ADJUDGED and DECREED that the petition for writ of habeas corpus of Karl A. Maley be, and hereby is, GRANTED. Petitioner shall be relieved of any restraint imposed by the challenged judgment. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered the 20th day of December, 1973, at Austin, Texas.

/s/ JACK ROBERTS
Jack Roberts
United States District Judge

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil Action No. W-73-CA-87

KARL A. MALEY

v.

THE HONORABLE JAMES R. MEYERS

JUDGMENT

This action came on for consideration by the Court, Honorable Jack Roberts, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, it is

ORDERED and ADJUDGED

that Respondent or his successor in office relieve petitioner, Karl A. Maley, of any restraint imposed in contravention of the Court's Memorandum Opinion and Order of December 20, 1973.

Dated at Waco, Texas, this 7th day of January, 1974.

DAN W. BENEDICT
United States District Clerk

By /s/ RUTH DREWERY
Deputy United States
District Clerk

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-73-319 Phx WEC

GARY RUSSELL, Petitioner,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

No. Civ-73-320 Phx WEC

HARRY KENNEDY and BRUCE STREEPER, Petitioners,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

No. Civ-73-321 Phx WEC
(Consolidated)

MIKE ARNOLD, Petitioner,

vs.

PAUL BLUBAUM, Sheriff of Maricopa County, Arizona, Respondent.

ORDER

In these cases, which were consolidated for hearing, the City of Phoenix filed a civil action against petitioners in Maricopa County Superior Court, claiming they were exhibiting allegedly obscene films at two theatres in Phoenix. Petitioners were served with subpoenas duces tecum requiring them to produce the films in court. The complaint prayed "that the said film is determined, by this

Court, to be obscene, that Respondents be ordered to surrender it to Petitioner for possible criminal prosecution . . ." Petitioners stipulated to an injunction against any future exhibition of the films, and refused to surrender the films, moving to quash the subpoenas on the grounds that they violated petitioners' Fifth Amendment rights. The trial courts denied the motions to quash on the basis of *Anderson v. Coulter*, 108 Ariz. 388, 499 P.2d 103 (1972), *cert. denied*, 41 U.S.L.W. 3503 (1973).

Petitioners still refused to surrender the films and were found in contempt of court under A.R.S. §12-864. They were sentenced to incarceration, which sentence was stayed upon posting bond and pending collateral attack in this Court. Petitioners now seek a writ of habeas corpus in this Court.

Since petitioners are free on bond, they are in custody for purposes of 28 U.S.C. §§2241(c)(3) and 2254(a). *Hensley v. Municipal Court*, ____U.S.____, 93 S.Ct. 1571 (1973). Since a conviction under A.R.S. §12-864 is unappealable in Arizona, *Anonymous v. Superior Court*, 4 Ariz. App. 170, 418 P.2d 416 (1966), and petitioners have raised their grounds in the trial courts, available state remedies have been exhausted. This Court concludes that it has jurisdiction over the instant case.

In *Anderson v. Coulter, supra*, the Arizona Supreme Court held that a person who exhibits to the public an allegedly obscene film has, by that showing, waived his right to claim his privilege against self incrimination when subpoenaed to produce the film at a prior adversary hearing to determine if it is obscene.

That expression by means of motion pictures is included within the free speech and free press guaranty of the

First and Fourteenth Amendments is established. *Burstyn v. Wilson*, 343 U.S. 495 (1952). It is clear that an exhibitor has a Fifth Amendment right to refuse to produce a film at a prior adversary hearing to determine its obscenity. *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *rev'd on other grounds*, 401 U.S. 990 (1971). *See also State v. Eros Cinema, Inc.*, 262 La. 706, 264 So.2d 615 (1972), *People v. DeRenzy*, 275 Cal.App.2d 380, 79 Cal. Rptr. 777 (1969). Thus, the holding in *Anderson* declares that an exhibitor who exercises his First Amendment rights by showing the film thereby waives his Fifth Amendment rights. However, it has been declared repeatedly that one constitutional right cannot be surrendered as a penalty for asserting another. *U. S. v. Jackson*, 390 U.S. 570 (1968); *Simmons v. U. S.*, 390 U.S. 377 (1968). *Compare Perry v. Sinderman*, 408 U.S. 593 (1972), *with Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The holding in *Anderson* also creates a result condemned by the United States Supreme Court in *Smith v. California*, 361 U.S. 147 (1959). There the Court invalidated a California obscenity ordinance which permitted conviction without proof of the bookseller's scienter. The Court reasoned that the effect of such strict liability statute would be to force a bookseller to become a censor. A bookseller, apprehensive about the possible obscenity of certain books, would keep them off his shelves. This would result in a limitation of the public's right to access to non-obscene, as well as obscene books. In the instant case, a film exhibitor might refuse to exhibit a film to the public if he feared it might be considered obscene because, by so showing the film, he would waive his Fifth Amendment

rights. Again, as in *Smith v. California, supra,* the result would be that the public's access to films is curtailed.

Respondent cites as authority *Simmons v. U. S., supra,* which held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, this testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. Respondent argues that the hearing at which production of the film was compelled by the subpoena duces tecum should be viewed as either a probable cause hearing or as being similar to a hearing upon a motion to suppress. As a result, respondent says, testimony of the petitioner would be excluded and no prejudice would attach. But it is not testimony which the state seeks at this hearing, but rather the film itself, which represents the body of the evidence to be produced at a later criminal trial for obscenity. This is clear from the City's own state court complaint which prayed "that Respondents be ordered to surrender it (the film) to Petitioner *for possible criminal prosecution . . .*" (Emphasis added).

Next, respondent relies on *Katz v. U. S.*, 389 U.S. 347 (1967) for the proposition that what a person knowingly exposes to the public, even in his own home or office, is not a subject for Fourth Amendment protection. Respondent argues that this same proposition is applicable to the Fifth Amendment because the Fifth Amendment, like the Fourth, deals only with private matters. All that *Katz* says is that if a person makes a statement in public, someone who hears the statement can then repeat it in court in testifying against the accused. *Katz* does not say that the accused himself can be forced to take the stand.

Finally, respondent contends that if an exhibitor cannot be compelled to produce films at prior adversary hearings, it would thwart the entire purpose and thrust of the hearing and give "carte blanche" to an individual commercially exhibiting pornography to continue in his activities. This argument is unpersuasive because the state still has various valid alternative methods to deal with the problem. E.g., *Heller v. New York,* 41 U.S.L.W. 5067 (June 25, 1973); *Freedman v. Maryland,* 380 U.S. 51 (1965); *Demich, Inc. v. Ferdon, supra.*

This Court concludes, therefore, that petitioners are being held in violation of their constitutional rights.

IT IS ORDERED that a writ of habeas corpus issue against respondent, directing that petitioners be released from custody.

DATED this 11th day of July, 1973.

/s/ WALTER E. CRAIG
Walter E. Craig
United States District Judge

Supreme Court, U. S.
FILED
JUL 29 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS,
Petitioner

versus

THE HONORABLE JAMES R. MEYERS,
Respondent

On Writ of Certiorari To The 169th Judicial District Court of Bell County, Texas

BRIEF FOR THE RESPONDENT

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---

BRIEF FOR THE RESPONDENT

THE OPINION BELOW

No formal opinion was filed by the court below, the 169th District Court of Bell County, Texas. A formal judgment was entered by such court and is reproduced as Appendix A of the Petition for Writ of Certiorari at pages 27-29.

JURISDICTION

The formal jurisdictional requisites would seem to be satisfied.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena dueces tecum, issued in a civil case, and which demands a potentially self-incriminatory production of magaziņes that previously have been displayed for commercial distribution where the witness does not own the magazines.
2. Whether an attorney can be held in contempt for advising his client to disobey a direct order of a Court to produce materials previously called for by a subpoena duces tecum where there is no valid self-incrimination privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner asserts that the Fifth Amendment privilege against self-incrimination, the Ninth Amendment residuum of individual rights and the Fourteenth Amendment due process clause are involved.

Also involved are the Texas obscenity statute and the Texas contempt statute.

The revelant portions of the constitutional and statutory provisions are reproduced in Appendix A of the Brief for Petitioner.

STATEMENT OF THE CASE

The judgment for contempt grew out of civil injunction proceedings filed in the 169th Judicial District Court of Bell County, wherein the State of Texas sought to enjoin the sale of certain named magazines, the State alleging that such magazines were obscene. (Appendix 2.) The proceeding was authorized by Article 527 of the Texas Penal Code of 1925 as the statute was then written.

One Michael McKelva was the operator of the store where the magazines were kept for sale to the public. (A. 2, 9, 17.) McKelva was subpoenaed by the State of Texas, the subpoena ordering him to appear in court with some 47 named magazines. (A. 2.) McKelva declined to produce the magazines asserting that he was not the owner thereof, that such magazines might be obscene and that their production would tend to incriminate him. (A. 5, 17, 18.) McKelva further said that he was acting according to the advice of counsel, Petitioner herein. (A. 18.)

The state court, Judge Clawson sitting at that time, then gave a direct order to McKelva to produce the magazines at 1 PM, and recessed the court to give McKelva time to obtain and produce the magazines sought by virtue of the subpoena duces tecum. (A. 20.)

When the court reconvened, McKelva again did not produce the magazines, asserting that he would not do so and further advising the court that he was acting on advice of counsel, the Petitioner. (A. 22, 23, 27.) The

state judge, Judge Clawson, found McKelva, Petitioner and another counsel for McKelva guilty of contempt. (A. 23, 29.)

Pursuant to Article 1911a, Vernon's Texas Civil Statutes, the contempt against Petitioner, who is an attorney, must be reviewed by another district judge. This was done by the Honorable James R. Meyers, Respondent herein, who entered judgment on September 28, 1973, affirming Judge Clawson's initial judgment of contempt and setting the $500.00 fine. (A. 40.) It should be noted that Judge Meyers found as a fact that Maness had advised McKelva not to obey the second order of Judge Clawson ordering McKelva to produce the magazines as called for by the subpoena. (A. 37, 38.)

ARGUMENT AND AUTHORITIES

1. The Magazines Subpoenaed Which Were Displayed For Sale To The Public, Are Not Private Books And Papers So As To Support A Claim For Self-Incrimination

It should first be noticed that the proceeding involved was civil in nature, the purpose being to enjoin the sale of obscene magazines, and so there was no absolute prohibition against the use of a subpoena duces tecum as would have been true if McKelva was a defendant in a criminal case. Second, the witness, McKelva, did not own the magazines. And third, the magazines were openly displayed for sale to the public. These facts make it abundantly clear that the magazines which were

subpoenaed can in no way be equated with the private books-and-papers, self-incrimination principle as defined by *Boyd v. United States,* 116 U.S. 616 (1886).

Observation is initially made that the privilege against self-incrimination does not apply here since the magazines were owned by a third party. *Johnson v. United States,* 228 U.S. 457 (1913). See also Rule 206 of the Model Code of Evidence, American Law Institute and *Bellis v. United States,* infra. The fact of non-ownership alone destroys any claim of the privilege in this case.

Moreover, what a person exposes to the public, here the magazines that were the subject of the subpoena, should not be entitled to the constitutional protection given by the self-incrimination clause to a person's private papers. See *Katz v. United States,* 389 U.S. 347 (1967); *Lewis v. United States,* 385 U. S. 206 (1966); Rule 231 (b), Model Code of Evidence, American Law Institute; *Anderson v. Coulter,* 499 P.2d 103 (Ariz. Sup.Ct. 1972), cert. den. 410 U. S. 990.

Finally, the claimed Fifth Amendment justification for McKelva's failure to produce the subpoenaed magazines would seem to be completely destroyed by this Court's decision in *Bellis v. United States,* ____ U. S. ____, 42 L. W. 4788 (1974). There, after a discussion of earlier Supreme Court cases, it was stated and held:

> "These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be limited to its historic function of protecting only the natural individual

from compulsory incrimination through his own testimony or personal records.' *United States* v. *White, supra,* at 701. *White* is only one of the many cases to emphasize that the Fifth Amendment privilege is a purely personal one, most recent among them being the Court's decision last Term in *Couch* v.*United States,* 409 U.S. 322, 327-328 (1973). Relying on the fundamental policy limiting the scope of the privilege, the Court in *White* held that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity.' 322 U. S., at 699."

Clearly, McKelva's self-incrimination claim has less body and substance than the claim rejected in *Bellis* and should likewise be rejected by this Court. McKelva had no privilege to assert and his refusal to produce the subpoenaed materials as ordered by the state court was properly punishable as contempt.

2. The Contempt Conviction Against McKelva Being Proper, Since McKelva Had No Valid Self-Incrimination Privilege, The Contempt Conviction Against Petitioner for Advising McKelva To Disobey The Court's Order, Is Likewise Proper

It is important to keep this case in perspective. McKelva was ordered to produce 47 magazines by subpoena duces tecum at a State hearing to enjoin the sale of obscene materials. The defense claimed that such magazines might be interpreted as being obscene and were therefore self-incriminatory. Accordingly, Petitioner advised McKelva not to produce said magazines under the subpoena duces tecum and when

McKelva appeared at the State District Court, he so advised the court, noting that he was claiming his privilege against self-incrimination on the advice of his counsel.

After McKelva failed to produce the magazines pursuant to subpoena and advised the court that he was doing so on the advice of counsel, the court then ordered him directly, in open court, to produce the magazines and adjourned court in order to permit McKelva to comply with the court's order. When court reconvened, McKelva again refused to produce the magazines pursuant to the court's direct order, again acting on the advice of counsel to disobey this second, direct order to produce the magazines. It was this second disobedience of the court's order that produced the contempt citation against McKelva and caused the court to hold Petitioner in contempt for advising this second flaunting of the court's ruling.

The state court's order to produce the magazines should have been obeyed (even if, for the purpose of argument, the order was illegal), and counsel should not have been given by Petitioner to McKelva to disobey the order. This conclusion is required since the courts must be the referee of proceedings before them and cannot permit the parties and lawyers to make judicial decisions contrary to the judgment of the courts. *Walker v. City of Birmingham,* 388 U. S. 307 (1967); *Howat v. Kansas,* 258 U. S. 180 (1922); Rule 204, American Law Institute's Model Code of Evidence.

In the instant case, McKelva *might* (no one knows since the subpoenaed magazines were not produced)

have been asserting the self-incrimination privilege for magazines such as Good Housekeeping, Boy's Life and Popular Mechanics. Courts simply must have the power to require production of the material for which the privilege is claimed in order to pass on the efficacy of the privilege in any particular case. (The rule as compelling a testimonial answer may be otherwise, as argued by Petitioner at pages 47, 48 of his Brief (although the rule has been severely criticized by legal scholars, e.g. Wigmore, infra, § 2271, page 419, et seq.), but with reqard to the production of documents, the compelling of their production seems clearly to be judicially countenanced. *Bellis v. United States,* supra.)

Notice should be made that McKelva would not have been surrendering an irretrievable Fifth Amendment right by complying with the subpoena duces tecum and the court's direct order to produce the magazines (as claimed by Petitioner). As Respondent urges, a court must have the power to decide the privilege (just as it has the power to make other rulings on the law) or a trial would become a shambles. But where a judge makes an erroneous ruling as to the privilege against self-incrimination and compels a witness to answer, the witness' privilege is not "irretrievably lost." The correct prophylactic rule is suggested by Wigmore on Evidence, the McNaughton revision, Volume VIII, § 2270, pages 417-419, as follows:

> "Where the witness has properly made his claim of privilege and it has been erroneously overruled, evidence of his testimony is inadmissible against

> him in any subsequent proceeding. While such erroneously compelled disclosure does not immunize the witness against prosecution for any crime to which the discloure relates, there are dicta in the opinions supporting the proposition that it may render inadmissible any 'fruit of the poisonous tree.' "

The foregoing rule solves the dilemma of the competing interests of orderly trials managed by the judge and protecting the self-incrimination privilege of a witness.

However, McKelva, having the duty to obey the court's order to produce the subpoenaed magazines, having no valid privilege against self-incrimination (or arguendo, having the duty to produce the magazines even though the court's order was erroneous in overruling the claimed privilege), an attorney, as an officer of the court, logically has a a higher duty to avoid the obstruction of justice by not advising disobedience of a court order.

In *Petition for Green,* 175 N. E.2d 59 (Sup. Ct. Ohio 1961), rev. on other grounds, 369 U.S. 689 (1962), the Supreme Court of Ohio sustained the contempt conviction of an attorney who had advised his labor union clients to disobey a trial court's injuction prohibiting them from picketing at a certain location. The court observed:

> "An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void. But does not an attorney stand in a somewhat different position? He is an officer and

> arm of the Court and as such has a duty to recognize and uphold the orders of the court as long as such orders stand. Consequently, an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability that may attach to such order." *Id.*, at 62.

Although counsel had the right to advise his clients that, in his opinion, the court lacked jurisdiction to issue the order,

> ". . . when he went further and told them to disobey the order, which they did, he laid himself open to the contempt charge." *Id.*, at 63.

Although the United States Supreme Court reversed, 369 U.S. 689 (1962), it did not question the trial court's imposition of the contempt citation, but only the lack of procedural due process which attended its imposition.

A number of other courts have adjudged attorneys in contempt for advising a client to disobey a court order. In *Anderson v. Comptois*, 109 F. 971 (9th Cir. 1901), a federal appellate court affirmed the contempt conviction of an attorney who advised a client to disobey a writ of supersedeas. Counsel may validly advise his client that a court's order is void,

> ". . . but he is guilty of contempt if he goes beyond the right to advise in matters of law, and, actuated by a spirit of resistance, counsels or conspires with his client or others to disobey an order of court and obstruct its enforcement." *Id.*, at 974.

The Supreme Court of Colorado rule, in *People ex rel. Alexander v. District Court of 10th Judicial District*, 68 P. 242 (Sup. Ct. 1901) that,

> "[a] n attorney who advises a course to be taken by parties, which, when followed, results in a contempt, is himself guilty of a contempt." *Id.*, at 263.

See also *Holt V. McLaughlin*, 210 S.W.2d 1006 (Sup.Ct.Mo., 1948).

Finally, in a recent California case, *In re Bongfeldt*, 99 Cal. Rptr. 428 (Ct.App. 1972), in which an insurance claims adjuster refused to answer certain deposition questions and was as a result held in contempt, the middle-level appellate court decried the trial court's failure to cite for contempt the adjuster's attorney:

> "In our view, were the contempt of each to be weighed, that of the attorney would be the greater. In such cases courts should not hesitate also to impose contempt sanctions upon the errant attorney." *Id.*, at 435.

Here, Petitioner was entitled to advise McKelva that a court's order to produce the magazine was in his (Petitioner's) opinion void, but where Petitioner went farther and advised McKelva not to obey the order, such action was contemptuous of the court and supports the conviction that is the subject of the certiorari.

CONCLUSION

McKelva did not have a privilege against self-incrimination to assert to account for the non-production of the subpoenaed magazines since they were owned by a third party. In any event, the privilege was waived by the public display of the magazines. Moreover, the state court must have the opportunity to pass on the privilege, an opportunity denied to the court in this case by the refusal of McKelva to produce the magazines. Ergo, McKelva was in contempt of court and Petitioner was, accordingly, properly convicted of contempt for advising McKelva to commit contempt.

The judgment of the state district court holding Petitioner in contempt should be permitted to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that three copies of the above and foregoing Brief for the Respondent have been deposited in the United State Mail, postage prepaid, first class, certified, on this the _____day of July, 1974, to: William F. Walsh, 1955 Richmond Avenue, Houseon, Texas 77006.

LONNY F. ZWIENER
Assistant Attorney General

FILED
OCT 18 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent*

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas

MOTION AND APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

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MOTION AND APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE

To The Honorable Judges Of The Supreme Court Of The United States Of America:

NOW COMES THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION, by and through its designated representatives Marvin O. Teague, Malcolm Dade and Kerry P. Fitzgerald, and presents this Motion and Application for Leave of Court to Make Appearance in the captioned cause in the capacity as Amicus Curiae, pursuant to Rule 42, Rules of the Supreme Court, and, for grounds and reasons therefor, the said Texas Criminal Defense Lawyers Association would respectfully show unto the Court the following:

INTEREST OF THE AMICUS CURIAE

The Texas Criminal Defense Lawyers Association, hereinafter referred to as the "Association," is composed of more than 1,000 licensed Attorneys at Law who are actively engaged in the practice of criminal law in the State of Texas. The Petitioner, MICHAEL ANTHONY MANESS, is a member in good standing of the Association. The day-by-day conduct of the members' profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts, from the lowest inferior Court in the State system to the highest and Supreme Court of the Federal system. The main issue presented in this Cause, concerning the Petitioner, MICHAEL ANTHONY MANESS, namely, whether an Attorney at Law, in the representation of his client, acting in good faith may properly advise his client to invoke and assert the rights and privileges of self-incrimination provided by the Fifth Amendment to the Constitution of the United States of America, as made applicable to the States through the Fourteenth Amendment to the Constitution of the United States of America, is of such grave importance to each member of the "Association" as it will dominate in the future such professional consideration and advice, in a given factual situation, that the members of the Association as a whole may give to their respective clients in the future.

The "Association" supports the position of the Petitioner, MICHAEL ANTHONY MANESS, seeking relief from the Judgment of Contempt, entered by the Presiding Judge of the 169th Judicial District Court of Bell County, Texas, and its position is that a licensed Attorney at Law may, acting in the best interests of the client and of professional consideration, give such necessary legal advice to the client, in good faith, without fear that the Attorney's independence will be chilled by the possibility that he will be summarily punished if the legal advice given later proves to be incorrect; albeit how sincere and in good faith it was initially given.

WHEREFORE, PREMISES CONSIDERED, the Texas Criminal Defense Lawyers Association, being herein represented by the aforesaid named persons, respectfully requests permission of the Court to appear as Amicus Curiae in the above entitled and numbered cause, to file its brief, and, should the Court see fit, to present oral argument to the Court upon the aforesaid hearing of said cause.

Respectfully submitted,

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BRIEF FOR THE AMICUS CURIAE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

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(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong. 14

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-689

MICHAEL ANTHONY MANESS, *Petitioner*

versus

THE HONORABLE JAMES R. MEYERS, *Respondent*

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas

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BRIEF FOR THE AMICUS CURIAE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

THE OPINION BELOW

No formal written opinion was filed by the Court below in support of the judgment of criminal contempt entered against the Petitioner.

JURISDICTION

The judgment of criminal contempt against the Petitioner, dated September 28, 1973 and entered of record on October 1, 1973, is reproduced in Appendix A of the Petitioner's petition for certiorari at pages 27-29. The orders of the Court of Criminal Appeals of Texas and the Supreme Court of Texas denying the Petitioner's original applications for habeas corpus relief on October 11, 1973 are reproduced in Appendix B and Appendix C of the Petitioner's petition for certiorari at pages 33 and 34. The filing of the petition on October 24, 1973 was timely under Rule 22(1) of the Court.

Because the contempt judgment entered by the Respondent against the Petitioner is not subject to review in any higher Texas court, the case is within the Court's certiorari jurisdiction conferred by 28 U.S.C. § 1257(3). *Stanford v. Texas*, 379 U.S. 476, 480 (1965); *Thompson v. City of Louisville*, 362 U.S. 199, 202-03, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960).

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demanding a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's Federal constitutional claims implicate the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to effective assistance of counsel, the Ninth Amendment residuum of individual substantive rights and the Fourteenth Amendment guarantee of due process of law.

The relevant provi;sions of the Constitution of the United States, the Texas obscenity statute (Article 527 of the Texas Penal Code) and contempt statute (Article 1911a of the Revised Civil Statutes of Texas) and an obscenity ordinance enacted by the City of Temple, Texas on October 19, 1972, are reproduced in Appendix A of Petitioner's brief at pages 61-68.

STATEMENT OF FACTS OF THE CASE

The facts of the case, as set forth by Hon. Jack Roberts, United States District Court, Western District of Texas, Waco Division, in *Maley v. Meyers*, Civil Action No. W-73-CA-87, July 11, 1973, Opinion Unreported, see, however, Appendix C, Brief for the Petitioner, at page 74, adequately states the events leading to the Petition for Writ of Certiorari by Petitioner.

There, Judge Roberts said:

> In early 1973, the City of Temple filed a civil proceeding to enjoin McKelva from distributing some 52 allegedly obscene magazines. The City issued a subopena duces tecum directing McKelva to produce the 52 magazines for trial. While the injunction proceeding was, of course, civil in nature, McKelva would be subject to criminal prosecution under Article 527 of the Texas Penal Code upon a showing that the magazines he had exhibited and distributed were "obscene" within the meaning of that article. The question of the magazines' "obscenity" was likewise the critical issue in the injunction proceeding. At the injunction hearing, McKelva announced that he did not have five of the magazines, and filed a motion to quash the subpoena as to the remaining 47 publications. The motion was overruled by the trial judge, The Honorable J. F. Clawson of the 169th Judicial District Court of Bell County, who directed McKelva to produce the magazines within three hours.
>
> When the court reconvened three hours later, McKelva announced that he would not produce the magazines upon the advice of counsel that his right against self incrimination would be endangered by production of the evidence. Thereupon, Judge Clawson found McKelva in contempt for refusing to obey the subpoena and found his lawyers including Petitioner, guilty of contempt for advising and counseling McKelva not to obey the subpoena. Petitioner invoked his right, as an officer of the court, under TEX. REV. CIV. STAT. ANN., art. 1911a (2) (c), to be tried by a judge of a district court other than the offended court. Respondent was duly appointed for that purpose by the presiding judge of the Third Administrative Judicial District. Petitioner was subsequently tried before Judge Meyers and found guilty

> of contempt. A $500 fine was assessed as punishment.

The conduct of the Petitioner, in acting as attorney for McKelva, as pointed out by the Petitioner in his brief, during all of the proceedings before the first trial judge, as well as his personal appearance before the second trial judge, reflects a record devoid of any effort by Petitioner to use the legal advice he gave to McKelva "as a transparent shield for the obstruction of justice."

> On the record the Petitioner's good faith is unassailable, and there is not the slightest evidence of the contumacious intent that has traditionally been regarded as essential to the imposition of a valid judgment of criminal contempt. (p. 53 of Brief of Petitioner). The entire record uniformly reflects that throughout the course of the proceedings neither the lawyers nor the Court manifested on any occasion the slightest animosity, anger or discourtesy but, on the contrary, consistently displayed toward each other an undisturbed and uninterrupted attitude of respectful [professional] intellectual equality. (p. 17 of Brief of Petitioner).

Thus, the Record of this Cause is unlike that found in the "infamous" Chicago Seven [Sic] Trial, see *The Conspiracy Trial,* nor as that found in such cases as *Illinois v. Allen,* 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). See also *Mayberry v. Pennsylvania,* 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); and *United States v. Seale,* 461 F.2d 345 (7th Cir. 1972). Even after adjudging the Petitioner and his Co-Counsel guilty of contempt of court and remanding them to jail, the first trial judge said, concerning the preparation of any necessary

papers by Petitioner in order to comply with Art. 1911a, V.A.T.C.S.: "And you may have access to my library if you desire." (App. 33).

Though the Record of this Cause leaves much to be desired, in the way of facts, the following should not be questioned:

1. Mike McKelva, a client of Petitioner who is and was a licensed Atttorney at Law, had prior to the lawsuit made the basis of this lawsuit, been charged, tried and convicted by the City of Temple, Texas, for selling allegedly obscene matter, See p. 78 of the Brief of the Petitioner, and, at the time of the lawsuit, the basis from which the contempt citation against Petitioner arose, these cases were on appeal *de novo* to the County Court of Bell County, Texas. See Art. 45.10, V.A.T.C.C.P.
2. Apparently, the magazines used in the Municipal Court cases were introduced into evidence at the lawsuit made the basis of the contempt citation against Petitioner. (App. 9). The trial court found, in the injunction suit, the seven (7) magazines, introduced into evidence, "Obscene" and also found that "by admission of Counsel the forty-seven named publications in the subpoena duces tecum are also obscene as that term is defined by the State law and the City Ordinance." (p. 28 of Appendix of Petitioner's Brief.)
3. The client McKelva was served during the injunction trial with a subpoena to bring forty-seven (47) designated magazines to Court. (App. p. 3 contains a list of fifty-two (52), but, by agreement, five (5) of these were deleted).
4. A Motion to Quash the Subpoena was filed, heard and overruled by the trial judge in the Injunction suit. (App. p. 15).

5. After being called as a witness by the City Attorney, McKelva acknowledged being served with the subpoena, but refused to bring the listed magazines to Court "solely because I believe that the production of such magazines would entail a substantial possibility of self-incrimination." (App. 23).
6. The trial court, thereupon, held McKelva in contempt of Court, assessed his punishment at ten (10) days confinement in the Bell County, Texas jail, together with a fine of $200.00. McKelva was confined, but after serving seven (7) days, he was given three (3) days credit, with the fine being remitted by the Trial Court, and then Ordered Released. (App. 2).

The issue and rights involving either the owner, custodian, possessor, etc., of printed articles sought to be subpoenaed, are not directly in this Petition for Certiorari. *Cf. Couch vs. United States,* 409 U.S. 322, 93 St.Ct. 611, 34 L.Ed.2d 548 (1973). However, there should be no question that the client, McKelva, and the reason he was held in contempt of court are involved indirectly in this lawsuit. Compare, however, the Annotation, "Right of Member, Officer, Agent, or Director of Private Corporation or Unincorporated Association to Assert Personal Privilege Against Self-Incrimination with Respect to Production of Corporate Books or Records," Vol. 52, 3rd Series, *American Law Reports,* 1973, commencing at page 636; the Annotation, "Privilege Against Self-Incrimination as Ground for Refusal to Produce Noncorporate Documents in Possession of Person Asserting Privilege but Owned by Another," Vol. 37, 3rd Series, *American Law Reports,* commencing at page 1373; the Annotation, "Privilege Against Self-Incrimination as Justification for

Refusal to Comply with Order or Subpoena requiring Production of Books or Documents of Private Corporation," Vol. 120, 1st Series, *American Law Reports*, 1939, commencing at page 1102; and the Annotation, "Privilege of Defendant in Contempt Proceeding as to Testifying Against Himself". Vol. 54, 1st Series, *American Law Reports*, 1928, commencing at page 1436.

As to the Petitioner, Michael Anthony Maness, one of the Attorneys who represented the defendant McKelva, the following should not be questioned.

1. He was in the lawsuit on the City's application for an injunction in the capacity as an Attorney at Law for McKelva. Another attorney, Maley, was co-counsel.
2. He presented the arguments on the Motion to Quash the Subpoena. He argued that:
   a. McKelva was not the owner of the magazines.
   b. The magazines sought dealt "explicitly with acts of a sexual nature."
   c. If McKelva were ordered to bring the magazines to Court, there was "a substantial possibility of self-incrimination."
   d. McKelva had previously been convicted for the sale of seven magazines "not named in the subpoena, but the character of the magazines that are named in the subpoena is such that a compulsory production of these publications would entail the same possibility of self-incrimination."
   e. If the magazines were produced by the client McKelva, "criminal prosecutions are not only a very definite possibility, they are in fact a pronounced possibility."

   f. The satisfaction of the subpoena, by McKelva, would "incriminate himself."
   g. The satisfaction of the subpoena, by McKelva, "perhaps quite probably would be used in the future as a basis for a criminal prosecution."
   h. The City of Temple, if they had probable cause, could secure a search warrant for the magazines.
   i. He constantly argued the provisions of the Fifth Amendment as being applicable to what the City of Temple desired to do. "It is very clear under these circumstances that this subpoena must be quashed because to require anyone to produce these sort of magazines, and that is regardless of the nature of the proceeding, would violate their [sic] Fifth Amendment rights."

The Contempt of Court Judgment of the trial court against Petitioner is, unquestionably, predicated upon the fact the trial court felt Petitioner had denied the trial court the opportunity to have access to the magazines. (App. 31). "I have found you in contempt because you have usurped the authority of this Court." (App. 31). "You are simply saying to the Court that because Counsel thinks that this is inadmissible evidence that it will not be subject to a subpoena under the power of this Court." (App. 32). Punishment assessed Petitioner, as well as his Co-Counsel, was ten (10) days' confinement and a fine of $200.00. (App. 32).

At the "new hearing", pursuant to Article 1911a, V.A.T.C.S., at which hearing only what had ocurred before the original trial judge was presented, opposing

Counsel *argued* that Petitioner and his Co-Counsel had been held in contempt of court "because their contempt is based upon the question *of actually advising the witness* not to fulfill the lawful order of the Court." (App. 37). (Emphasis italicized). The then trial judge stated into the Record: "I am dubious that materials displayed for public sale are Fifth Amendment protected, *but I think it is a very close point.*" (App. 38). (Emphasis italicized). That trial judge interpreted the Record, made before the original trial judge, to mean that Petitioner, as well as Co-Counsel, "advised [McKelva] to disobey the subpoena." (App. 39). Then trial counsel's interpretation and argument that Petitioner and his Co-Counsel had advised McKelva that if he produced the magazines, he [McKelva] would possibly be incriminating himself (App. 39), was not acceptable, as the then trial judge, who held the second contempt hearing, found both Petitioner and his Co-Counsel, Maley, guilty of contempt, and assessed their punishments at a fine of $500.00 for each of them without any confinement being assessed.

The Injunction suit was subsequently appealed to the Court of Civil Appeals sitting in Austin, Travis County, Texas, but, by Motion of the respective parties, McKelva and the City of Temple, Texas, the cause was remanded back to the original trial court as "all matters in controversy have been settled and that it is necessary to remand this case to the trial court for further disposition and for entry of the agreed final judgment." What the final judgment is or was to be entered is not known as same is not set out in the opinion of the Court of Civil Appeals. See *McKelva et al., v. The City of Temple,* (Tex. Civ. App. 1974), 506 S.W.2d 260.

INTRODUCTORY COMMENT

Subject, of course, to the final decision of this Honorable Court and any other legal remedies that may be available to Petitioner, if the trial court's Judgment of Contempt is upheld, then Petitioner must pay the $500.00 fine assessed against him or go to jail. However, the grave consequences facing Petitioner, as an Attorney at Law, are more than a mere $500.00 fine. As Circuit Judge Rives of the Fifth Circuit Court of Appeals recently observed in the case of *In re Butts,* 1974, 493 F.2d 842, which case also involved another Texas Attorney:

> Butts' conviction for contempt presumably could be used for impeachment and sentencing purposes in any future criminal proceeding. This conviction would be especially damaging if Butts were ever again accused of being in contempt of court. Conviction for contempt of court could also have serious adverse career consequences for Butts. His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage Butts' reputation in the legal community, and this in turn might affect his ability to attract clients and to represent them effectively, especially in open court. (844).

That, of course, is what is in store for Petitioner individually. However, the issues raised in his Petition for Certiorari are of such grave consequence to every licensed practicing Attorney in these United States, there should be no question of the importance of the decision to be rendered by this Honorable Court to the individual practicing members of the Bar.

SUMMARY

The question presented in this cause is totally unique in that it involves the right of a client to assert his constitutional right against self-incrimination, the right and duty of Petitioner as the attorney, to advise and counsel the client with respect to the client's personal assertion of his Fifth Amendment rights under the United States Constitution, and the rights and duties of Petitioner as attorney and counselor to render the effective asistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

The record is clear that the trial court believed that Petitioner's legal advice constituted a usurpation of the authority of the trial court and that the Petitioner was, in effect, judging for himself what was and what was not admissible evidence at the injunction hearing. The trial court also found that because of certain remarks made by Petitioner, that Petitioner and his client had, in effect, stipulated and the trial court could therefore find the forty-seven (47) books in question to be obscene.

It is submitted that the action, conduct and advice of Petitioner, acting in his capacity as legal counsel for the client, were entirely proper, reasonable, ethical and responsible.

It is further submitted that the judgment of contempt against Petitioner violates Petitioner's rights to due process of law and prevents Petitioner from effectively representing his client under the particular facts and circumstances of the case.

As already recounted, a lower court had already judged four magazines to be obscene, which judgment was

on appeal at the time of the injunction hearing. The City of Temple chose to invoke the injunction procedure available in Section 13 of Article 527 of the Texas Penal Code rather than invoke the provisions of Section 9 which provided for ample notice and hearing prior to a determination of obscenity. It is noteworthy that Section 13 has been omitted from the new penal code, effective in Texas January 1, 1974.

The statutes in the State of Texas do not define what is specifically meant by contempt of court, except in certain instances unrelated to this case. See *In re Norton*, 1946, Supreme Court of Texas, 191 S.W.2d, 713. In general, a person who perpetrates acts done in disrespect of the court or its process or obstructs the adminstration of justice is guilty of contempt of court. The purpose of a criminal contempt citation, as in the case at bar, is strictly punitive. *Crow v. State*, 1859, Supreme Court of Texas, 24 Tex. 12.

In the case at bar, Petitioner made it clear to the trial court that he had advised his client to invoke the Fifth Amendment as the production of the magazines in question might tend to incriminate him. At no time did Petitioner advise his client or inform the court that the magazines, as a matter of fact or as a matter of law, were admissible as evidence. Quite to the contrary, Petitioner advised his client to invoke the Fifth Amendment to challenge the manner used in this case to bring the magazines into Court and introduce them into evidence.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may properly be invoked to resist compliance with a subpoena duces tecum demand-

ing a potentially self-incriminatory production of magazines that previously have been displayed for commercial distribution.

2. Whether an attorney may be held in contempt of court:

(a) for giving legal advice to a client involving Federal Constitutional rights;

(b) in good faith and in the exercise of his professional judgment—whether right or wrong;

(c) without contumacious conduct or disrespect to the Judge; and

(d) when the client has no legal means to test the Judge's difference with his attorney's advice other than by following that advice, subject to being held in contempt himself if the advice is later held to be wrong.

The original Judgment of Contempt provided, excluding the formal introductory and concluding statements:

> On this the 2nd day of February, 1973, came on to be considered the matter of the refusal of the Defendant Michael McKelva to obey the subpoena heretofore issued out of this court commanding him to bring into court certain matter listed in said subpoena:
>
> And the Court having heard the statement of Counsel and the testimony of said Defendant McKelva admitting in open Court to having willfully and knowingly refused to comply with said subpoena duces tecum and their reasons for so refusing being considered without merit, finds that the defendant Michael McKelva and his Attorneys, Karl Maley

> and Michael Anthony Maness are all and each of them in contempt of this Court, the Defendant for failing and refusing to obey the subpoena duces tecum issued out of this Court on the 24th day of January, 1973, and his Attorneys for advising and counseling the said Defendant to disobey said subpoena; and the said Defendant and each of his said Attorneys are ordered punished for said contempt by confinement in the Bell County Jail for a term of ten (10) days and payment of a fine of Two Hundred ($200.00) Dollars.
>
> It is therefore Ordered that the Sheriff of Bell County take into custody the said Michael McKelva, Karl Maley and Michael Anthony Maness, and confine them and each of them until they shall have each served ten days from February 1, 1973 at 10:50 A.M. and paid their fines of Two Hundred Dollars each.
>
> The said Karl Maley and Michael Anthony Maness having filed and presented their motion under Article 1911 R.C.S. of the Statutes of Texas, are released on their personal recognizance pending hearing hereon in accordance with said article.

The subsequent Judgment of Contempt, entered after hearing was held pursuant to Art. 1911a, V.A.T.C.S., provides:

> BE IT REMEMBERED that on the 11th day of May, 1973, at Belton, Texas, the undersigned judge, Honorable James R. Meyers, sitting by designation in the above styled and numbered cause, conducted an evidentiary hearing, in accordance with Article 1911a, Tex.Rev.Civ.Stats., to review an order of the Honorable J. F. Clawson, entered in open court on February 2, 1973, which order found guilty of contempt of court Karl A. Maley and Michael Anthony Maness, officers of the Court, and which order fur-

ther assessed the punishment for each contemnor at 10 days confinement in the Bell County Jail and a fine of $200.00.

The Court having considered the entire record in this cause of action, it is ORDERED that the finding of guilty entered by Judge Clawson against the said Mr. Maley and Mr. Maness be, and they are hereby, affirmed; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Karl A. Maley be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973; and it is further ORDERED, in lieu of the punishment assessed by Judge Clawson, that the said Michael Anthony Maness be, and he is hereby, assessed the following punishment: a fine of $500.00, to be paid to the District Clerk, 169th Judicial District, at or before 12 noon, October 12, 1973.

Art. 1911a, V.A.T.C.S., provides:

Section 1. A court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue such writs and orders as may be necessary or proper in aid of its jurisdiction. It has the duty to require that proceeding shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done. A court has the power to punish for contempt.

Sec. 2. (a) Every court other than a justice court or municipal court may punish by a fine of not more than $500, or by confinement in the county jail for not more than six months, or both, any person guilty of contempt of the court.

(b) A justice court or municipal court may punish by a fine of not more than $100, or by confinement in the county or city jail for not more than

three days, or both, any person guilty of contempt of the court.

(c) Provided, however, an officer of a court held in contempt by a trial court, shall, upon proper motion filed in the offended court, be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. Said judge to be appointed for that purpose by the presiding judge of the Administrative Judicial District wherein the alleged contempt occurred.

Sec. 3. Nothing in this Act affects a court's power to confine a contemner in order to compel him to obey a court order.

Acts 1971, 62nd Leg., p. 2535, ch. 831, §§ 1-3 eff. August 30, 1971. Sec. 2 amended by Acts 1973, 63rd Leg., p. 1784, ch. 657, § 1, eff. Aug. 27, 1973.

"Many of us erroneously tend to identify defense lawyers with their clients. Defense lawyers themselves sometimes make the mistake of depreciating their role. Rather, those who represent deviants should paraphrase Milton's words in *On His Blindness*, "They also serve who only stand and wait," and say to themselves, "They also serve who only represent the deviant." The deviants are the care and responsibility of us all; but most of us prefer to pass them by, to walk on the other side of the street. Not so, those who defend them. They act, in a sense, as good Samaritans. The deviant needs a friend. He has at least one, his lawyer, who helps both him and the rest of us to arrive at manageable solutions. Defense lawyers, in representing their clients, can also act as peacemakers, thereby filling a great need. There are also intangible rewards, as defense counsel will have an opportunity to study at first hand the fears and hates of human beings." *Model Trials, American Jurisprudence*, Volume 10, "Obscenity Litigation," by O. John Rogge, Section 31, page 112.

DISCUSSION, ARGUMENT AND AUTHORITIES

There should be no question that the general rule, which provides a witness [McKelva] in a civil or criminal case to be protected by the Constitution of the United States from being compelled to incriminate himself, is present in this case.

In *Couch v. United States,* 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973), Mr. Justice Powell, speaking and writing for a Majority of the Court, in the factual situation which presented the question of the right of an owner of certain business records to invoke the Fifth Amendment privilege against self-incrimination, where those records were not in the possession of the owner but in the possession of the owner's accountant, who had in turn delivered the documents to the owner's attorney, held that the owner did not have the right to invoke the provisions of the Fifth Amendment and had no legal right to preclude the Government from obtaining possession of the documents sought by the Government.

His Honor, however, said:

> ". . . The importance of preserving inviolate the privilege against compulsory self-incrimination has often been stated by this Court and need not be elaborated. *Counselman v. Hitchcock,* 142 U.S. 547 (1892); *Malloy v. Hogan,* 378 U.S. 1 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966). By its very nature, the privilege is an intimate and personal one. It respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation. Historically, the privilege sprang from an abhorrence of governmental assault against the single individual accused of crime and the temptation on the part of the State to resort to

> the expedient of compelling incriminating evidence from one's own mouth. *United States v. White,* 322 U.S. 694, 698 (1944). The Court has thought the privilege necessary to prevent any "recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullman v. United States,* 350 U.S. 422, 428 (1956).
>
> In *Murphy v. Waterfront Commission,* 378 U.S. 52, 55 (1964), the Court articulated the policies and purposes of the privilege:
>
> > '. . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load." . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life," . . .'
>
> It is important to reiterate that the Fifth Amendment privilege is a *personal privileges* it adheres basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States,* 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness "against himself": it necessarily did not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and "prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compul-

sion to extort communication from *him*," *Holt v. United States*, 218 U.S. 245, 252-253 (1910) (Emphasis added). It is extortion of information from the accused himself that offends our sense of justice. . . .

. . . Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. . . .

. . . Petitioner's reliance on *Boyd v. United States*, 116 U.S. 616 (1886), is misplaced. In Boyd, the person asserting the privilege was in possession of the written statements in question. The Court in Boyd did hold that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime," violated the Fourth and Fifth Amendments. 116 U.S. 630. That case did not, however, address or contemplate the divergence of ownership and possession, and petitioner concedes that court decisions applying Boyd have largely been in instances where possession and ownership conjoined, see e.g., *Hill v. Philpott*, 445 F.2d 144 (C.A. 7, 1971); *U. S. v. Judson*, 63-2 USTC 9658 (C.A. 9, 1963). In Boyd, the production order was directed against the owner of the property who, by responding, would have been forced "to produce and authenticate any personal documents or effects that might incriminate him," *United States v. White, supra*, at 698. But again we reiterate that in the instant case there was no enforced communication of any kind from any accused or potential accused. . . ."

Mr. Justice Douglas, in his dissent, said:

". . . The decision today sanctions yet another tool of the ever-widening governmental invasion and oversight of our private lives. As I urged in dissent in

Warden v. Hayden, 387 U.S. 294, 325, without the right of privacy 'the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.'

By looking solely to the historical antecedents of the privilege and focusing on "the ingredient of personal compulsion," the majority largely ignores the interplay of the fundamental values protected by the Fourth and Fifth Amendments. As early as 1885 the Court recognized that issues often cannot be pigeonholed within one amendment or the other, thereby foreclosing consideration of related policies. *Boyd v. United States*, 116 U.S. 616. In dealing with the compulsory production of a private paper for use in a forfeiture proceeding, the Court stated:

'The principles laid down [in *Entick v. Carrington*] affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.' Id., at 630.

Although the subpoena in Boyd was directed at the person asserting the privilege, that fact cannot

be allowed to obscure the basic thrust of the Court's reasoning: the Fourth and Fifth Amendments delineate a "sphere of privacy" which must be protected against governmental intrusion. We confirmed in *Murphy v. Waterfront Commission*, 378 U.S. 52, 55, that "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' " is a fundamental policy underlying the Fifth Amendment.

The majority contends, however, that petitioner cannot reasonably claim "an expectation of protected privacy or confidentiality." The reasons asserted for this position overlook the nature of the accountant-client relationship. The accountant, an agent for a specified purpose—i.e., completing the petitioner's tax returns—bore certain fiduciary responsibilities to petitioner. One of those responsibilities was not to use the records given him for any purpose other than completing the returns. Under these circumstances it hardly can be said that by giving the records to the accountant, the petitioner committed them to the public domain.

I defined what I believe to be the boundaries of this right to privacy in *Warden v. Hayden*, supra, at 323:

'The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a non-descript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of the sharing.'

The majority, by the seeming implications of its opinion, has cleared the way for investigatory authorities to compel disclosure of facets of our life we heretofore considered sacrosanct. We are told that "situations may well arise where the relinquishment of possession is so temporary and insignificant as to leave personal compulsions upon the accused substantially intact." I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents. Are we now to encourage meddling by the government and ever more ingenious methods of obtaining access to sought after materials? The premium now will be on subterfuge, on bypassing the master of the domain by spiriting the materials away or compelling disclosure by a trusted employee or confidant. Inevitably, this will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that we have considered crucial to our democracy.

The decision may have a more immediate impact which the majority does not consider. Our tax laws have become so complex that very few taxpayers can afford the luxury of completing their own returns without professional assistance. If a taxpayer now wants to insure the confidentiality and privacy of his records, however, he must forego such assistance. To my mind, the majority thus attaches a penalty to the exercise of the privilege against self-incrimination. It

calls for little more discussion than to note that we have not tolerated such penalties in the past. *Cf. Uniformed Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 580; *Gardner v. Broderick*, 392 U.S. 273.

Thus, I would reverse the decision below, finding that the subpoena violated both petitioner's Fourth and Fifth Amendment rights. I offer one more observation. The majority cautions that respect for our constitutional principles is eroded "when they leap their proper bounds." We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights.

It is a Constitution we are construing not a legislative-judicial code of conduct that suits our private value choices or that satisfies the appetite of prosecutors for more and more short cuts that avoid constitutional barriers. Those constitutional barriers and the judicial traditions supporting them are the sources of the privacy we value so greatly. That privacy "protects people," not places, under the Fourth Amendment, *Katz v. United States*, 389, U.S. 347, 353. And as already noted *Boyd v. United States*, supra, held that when it comes to the "forcible and compulsory extortion of a man's own testimony or his private papers to be used as evidence to convict him of crime or to forfeit his goods"—that is an illustration of the manner in which "the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

One's privacy embraces what the person has in his home, his desk, his files, his safe as well as what he carries on his person. It also has a very meaningful relationship to what he tells any confidant—his wife, his minister, his lawyer, or his tax accountant. The constitutional fences of law are broken down by an

ever-increasingly powerful government that seeks to reduce every person to a digit. . . ."

Mr. Justice Marshall, in his dissent, said:

". . . I agree, of course, that possession does not define the limits of the protection which the Constitution affords to private papers, and add these comments to indicate how I would treat claims like petitioner's.

A. I begin with *Boyd v. United States*, 116 U.S. 616 (1886), whose continuing vitality is indicated by the majority's effort to distinguish it. That was a suit for the forfeiture of 35 cases of plate glass alleged to have been illegally imported. In the course of the forfeiture proceeding, the Government introduced into evidence an invoice of a prior shipment. The defendants objected on the ground that the use of the invoice violated their rights under the Fourth and Fifth Amendments, because the invoice was a private paper secured by a subpoena. This Court found a violation of both amendments.

One might interpret Boyd as holding that the Fifth Amendment prohibits the use of private papers in a criminal proceeding over the author's objection. The words of the Fifth Amendment surely can be read in that way. The use of the papers over objection "compel[s the author] in [a] criminal case to be a witness against himself." The compulsion occurs when the paper is introduced over objection, not when the paper is written or subpoenaed.

But that interpretation has not been adopted by this Court. See, e.g., *Perlman v. United States*, 247 U.S. 7 (1918); *Johnson v. United States*, 228 U.S. 457 (1913). And in some possible cases, consistent application of that interpretation of Boyd might lead to results at odds with common sense.

Another interpretation of Boyd has been accepted by this Court and by the leading commentators. See, e.g., *Curcio v. United States*, 354 U.S. 118, 125 (1957); 8 Wigmore, Evidence § 2264 (McNaughton rev. 1961); McCormick, Evidence §§ 126-127 (2d ed. 1972). When a party produces potentially incriminating evidence in response to a summons or subpoena, he implicitly testifies that the evidence he brings forth is in fact the evidence demanded. "The custodian's act of producing books or records in response to a subpoena duces tecum is itself a representation that the documents produced are those demanded by the subpoena. Requiring the custodian to identify or authenticate the document for admission in evidence merely makes explicit what is implicit in the production itself." *Curcio v. United States*, 354 U.S., at 125.

The potential for incrimination inherent in the act of production is illustrated by this case. The summons here called for the production of "all books . . . pertaining to the tax liability of" petitioner. Had the summons been directed to her, she would have implicitly testified, on producing some papers, that these were "all" the records sought. The Internal Revenue agents believed that she may have understated her income. Their belief might have been confirmed on examining all of her records, but not on examining only some of them. The records could then be used in a subsequent criminal prosecution for underreporting her income. If she produced only some of her books, though, she would be liable for contempt of the order. The Fifth Amendment was designed to prevent the Government from placing potential defendants in such a position. *Cf. Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964).

These considerations operate only against the person in possession of the papers, as the majority correctly points out. In this case, the accountant to

whom the summons was directed has made no claim that turning over the records he has, might incriminate him, for example, by exposing him to the charge that he had perjured himself in representing that the return prepared for petitioner was correct to the best of his knowledge and belief, 26 U.S.C. § 6065 (1970), or that he had knowingly aided in the preparation of a false return, 26 U.S.C. § 7206 (2) (1970). Nor could he be held to have represented more than that he had produced all the records in his possession.

However, the accepted interpretation of Boyd has an odd sound to it. Boyd emphasized that the invoice there was a private paper written by the defendants. Yet the accepted interpretation of the case makes the authorship and contents of the paper largely irrelevant. What is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order. If that is the only way rationally to interpret Boyd, it might make sense to do so. But it makes better sense to devise a rationale which focuses on the obvious concern of the case, the desire of the author of documents to keep them private.

B. This Court also held in Boyd that the Fourth Amendment was violated. Indeed, much of the opinion is devoted to a discussion of *Entick v. Carrington*, 19 How. St. Tr. 1029, a landmark in the development of the prohibition against unreasonable searches and seizures. Here too the doctrinal basis of the holding is unclear, in part because the Court correctly perceived that "[i]n this regard the Fourth and Fifth Amendments run almost into each other." 116 U.S., at 630.

Boyd suggested that the Fourth Amendment prohibited the seizure of "mere evidence." 116 U.S., at 623-624. See *Gouled v. United States*, 255 U.S. 298

(1921). Searches for mere evidence were unreasonable even if such a search was sure to produce evidence leading to a conviction. The precise contours of the "mere evidence" rule were shaped by concepts of property law which we now see as outmoded. See *Warden v. Hayden*, 387 U.S. 294, 303-307 (1967). But those concepts attempted to define, however imprecisely, a sphere of personal privacy which the Government could not enter over objection. See, e.g., *Gouled v. United States*, 255 U.S., at 304. And when this Court repudiated the "mere evidence" rule, it suggested that Fourth Amendment limitations might be devised precisely in terms of the interest in privacy, prohibiting the seizure of "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." *Warden v. Hayden*, 387 U.S., at 303. *Cf. Stanford v. Texas*, 379 U.S. 476, 485 (1965).

The Fourth and Fifth Amendments do not speak to totally unrelated concerns. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484-485 (1965); *Murphy v. Waterfront Commission*, 378 U.S., at 55. Both involve aspects of a person's right to develop for himself a sphere of personal privacy. Where the Amendments "run almost into each other," I would prohibit the Government from entering. The problem, as I see it, is to develop criteria for determining whether evidence sought by the Government lies within the sphere of activities which petitioner attempted to keep private. *Cf. Katz v. United States*, 389 U.S. 347, 351-352 (1967).

The first criterion, as Hayden suggests, is the nature of the evidence. Diaries and personal letters which record only their author's personal thoughts lie at the heart of our sense of privacy. In contrast, I see no bar in the Fourth or Ffith Amendments to the seizure of a letter from one conspirator to another directing the recipient to take steps which further the

> conspiracy. Business records like those sought in this case lie between those cases. We are not so outraged by the intrusion on privacy which accompanies the seizure of these records as we are by the seizure of a diary, yet the records could not easily be called 'instrumentalities' of tax evasion, particularly if they are accurate. . . ."

This Honorable Court is indeed fortunate. It is rarely, if ever, as here, where an individual has presented a case to any Court, based upon the fact that he was adjudged to be guilty of contempt of Court for giving bad advice to a client and that advice is later judicially determined to have been legally commendable advice. Cf. *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547 (558-559), 27 L.Ed.2d 543 (1971).

No case has been found by the Attorneys representing the Amicus Curiae where an Attorney has been jailed for only giving legal advice to a client. It is submitted that none exist or, hopefully, but for this case, will ever exist. Compare, however, *Ex parte McDonald*, 1969, Tex. Cr. App., 477 S.W.2d 938.

In this Cause, there should be no question that, initially the trial court had jurisdiction over the City of Temple's application for an injunction. See Arts. 4642, V.A.T.C.S., and 4667, V.A.T.C.S., and Art. 527, Sec. 13, V.A.T.P.C. There should also be no question that a District Court in the State of Texas has the power to issue a subpoena duces tecum for certain documents, if they exist. See Rule 177a, V.A.T.R.C.P.

There should also be no question that an Attorney at Law may not, without running the risk of Contempt of Court, bring about or cause an impediment to legal and valid Court Orders. "Even incorrect court orders must

ordinarily be obeyed until set aside." See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972); and *U. S. v. Seale*, 461 F.2d 345 (7th Cir. 1972).

However, the issuance and return of a subpoena duces tecum, it is submitted, in certain cases, as here, may run head on into the provisions of the Fourth and Fifth Amendments to the Constitution of the United States of America.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

If there is a confrontation, without more being present than here, the subpoena must fail as against the individual's Constitutional rights.

Can it be intelligently argued that if McKelva had obeyed the subpoena duces tecum and brought the magazines to Court, showed, displayed or turned them over to the Court and the City Attorney that he would not have been subsequently criminally prosecuted? No type immunity was either offered or granted to McKelva; either blanket type or limited type immunity.

Though a question of semantics may be present, from this Record, can it be other than accepted that where the client has been prosecuted for possessing or selling like items sought to be obtained by a subpoena duces tecum, that any Attorney at Law would do other than advise the client that if he brings the documents to court that not only may they be used to prosecute the client but in all probability will be used to prosecute the client in a future criminal action? Especially, after the trial court, without ever seeing the magazines, found them to be "obscene," thus doing what the highest criminal court of the State of Texas has said could not be done in order to sustain a like criminal accusation. Eg. *Bryers v. State*, 1972, Tex. Cr. App., 480 S.W.2d 712, and cases cited therein; and Hill v. State, 1972, Tex. Cr. App., 479 S.W.2d 288, and cases cited therein.

Unquestionably, conflicts between the Fifth Amendment and the right of trial Courts to subpoena certain documents are inevitably going to occur in this day and age. Here, McKelva was given a Court Order, subpoena duces tecum, to bring certain documents to Court. He consulted with Petitioner regarding this. What advice Petitioner, or Co-Counsel, Maley, gave McKelva is, from this Record, unknown. However, apparently, the advice was nothing more than: "If you bring the documents to Court, you will possibly incriminate yourself and possibly subject

yourself to future criminal prosecution." The client chose to exercise his right of self-incrimination and was held in contempt of court for exercising that right. The only relation of Petitioner to the exercise of that right by McKelva, by this Record, was that the client, McKelva, testified, in answer to questions whether he had the magazines, whether he had the magazines in his possession when served with the subpoena, and whether he brought the magazines to Court, that he was refusing to answer the questions "under [sic] the advice of Counsel . . . [and] on the grounds that it [the answer] may tend to incriminate me." (App. 18).

After being given an opportunity to get the magazines, McKelva testified he had made no effort to get the magazines, was aware of the Court order to get them, and refused to get them and bring them to Court. (App. 22). He was refusing, however, because he believed that the bringing of the magazines to Court "would entail a substantial possibility of self-incrimination." (App. 23).

Petitioner, in his Brief, admits he advised McKelva "to avoid the risk of involuntarily surrendering his rights under the Fifth Amendment by refusing to produce the magazines, after first explaining to his client the available legal alternatives involved and the possible legal consequences that might have resulted from adopting any one of them." (Brief at Page 14).

After making its findings, concerning the injunction suit, the trial court, sua sponte, found Petitioner and Attorney Maley guilty of Contempt. (App. 29).

Again, it was McKelva, the client, who invoked the Fifth Amendment; it was McKelva, the client, who refused to honor the subpoena duces tecum of the Court;

it was McKelva, the client, who refused to bring the magazines to Court; and it was McKelva, the client, who steadfastly refused to give up what he thought was his right of self-incrimination under the Constitution of the United States of America. IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DID THESE THINGS; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO PREVENTED THE COURT FROM SEEING THE MAGAZINES; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO FRUSTRATED THE COURT'S ACCESS TO THE MAGAZINES; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DECIDED TO FOREGO A MOTION TO SUPPRESS; IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DECIDED TO WAIVE MAKING AN OBJECTION TO THE POSSIBLE ADMISSIBILITY OF THE MAGAZINES DURING THE HEARING ON THE APPLICATION FOR AN INJUNCTION; AND IT WAS NOT THE PETITIONER OR HIS CO-COUNSEL WHO DETERMINED THAT THE MAGAZINES WERE NOT SUBJECT TO THE SUBPOENA DUCES TECUM.

IT WAS McKELVA, THE CLIENT, WHO DID THESE THINGS. PETITIONER AND HIS CO-COUNSEL, MALEY, MERELY ADVISED THE CLIENT WHAT WOULD POSSIBLY OCCUR IF McKELVA DID OBEY THE SUBPOENA DUCES TECUM. Is this contemptuous conduct?

Can it ever be suggested that if the State of Texas well believes that a person is guilty of a criminal wrong, that it is the person's Attorney's obligation to advise the client that he must come forward and confess his guilt? Cf. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23

L.Ed2d 274 (1969); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 337 (1940). That, it is submitted, appears to be what the Respondent argues.

In short, there is not a scintilla of evidence in this Record that Petitioner or his Co-Counsel, Maley, did other than advise the client, McKelva, as to the *consequences* if McKelva refused to obey the subpoena duces tecum issued by the trial Court.

For what other purpose does one have an Attorney except to obtain legal advice? For otherwise, "The first thing we do, let's kill all the lawyers." William Shakespeare, "King Henry VI, Part IV."

McKelva received the legal advice, via Petitioner, to which he is presumptively guaranteed to receive by the Sixth Amendment to the Constitution of the United States. It was McKelva's decision to accept or reject it. He chose the former.

Unfortunately, there is no right of appeal in the State of Texas from a trial court's overruling of a motion to quash a subpoena duces tecum and the refusal to testify. See Vol. 61, *Tex. Jur.* 2d, "Witnesses", Sec. 32, pages 565-566. There is also, in the State of Texas, no legal recourse, save and except the Great Writ, to test the validity of a judgment of contempt. See *Taylor v. Nagle*, (Tex. Civ. App. 1967), 412 S.W.2d 812. Thus, it should not be questioned that McKelva was advised that if he did not give up his right of self-incrimination "to jail he would probably go." Apparently, McKelva, the client, was willing to accept the judgment of the trial Court rather than purge himself as he stayed in jail seven of the ten days assessed against him, at which time he was

ordered released. No continuing confinement Order was entered that McKelva was to remain confined until he delivered the magazines into Court. There was no offer by McKelva, after having his punishment assessed or while serving his punishment, nor was there an offer from the trial court that if McKelva then complied with the subpoena duces tecum the contempt judgment would be set aside; merely that McKelva was assessed a certain time and fine as his punishment.

In short, there is nothing in this Record to reflect that the decision to refuse to respond to the subpoena duces tecum was anyone's but McKelva. Petitioner has conceded he advised McKelva of the consequences of his act if he did not respond to the subpoena. It was McKelva, not Petitioner, who frustrated the trial court's not seeing the later to be adjudicated "obscene" magazines.

It matters not that this was a civil proceeding held pursuant to a municipality's application for an injunction. See *McCarthy v. Arndstein*, 266 U.S. 34, 69 L.Ed. 158, 45 S.Ct. 16 (1924); *Ex parte Scott*, Supreme Court of Texas, (1939), 133 Tex. 1, 123 S.W.2d 306; and *McCrone v. United States*, 370 U.S. 61, 64, 83 L.Ed. 1108, 1110, 59 S.Ct. 685 (1939).

Only the client, McKelva, could invoke the privilege against self-incrimination. Also, again, McKelva was not offered either transactional or use immunity. See *United States v. Calandra*, 410 U.S. 925, 35 L.Ed. 585, 93 Sup.Ct. 1357 (1974).

In fact, if McKelva had, contrary to the advice given him by Petitioner and Co-Counsel, Maley, decided not to invoke the Fifth Amendment provisions and not voice his right of self-incrimination, but had done the opposite,

neither Petitioner nor Maley nor the both of them could have objected as the right of self- incrimination, being a personal and individual right, could not have been invoked by or on behalf of McKelva by Petitioner or his Co-Counsel, Maley.

It is not known, by this Record, where the magazines were kept or were located, either when the subpoena duces tecum was issued, served, or when McKelva was interrogated by the City Attorney or the Trial Judge. The subpoena was directed to McKelva, "who resides at 526 Wolf, Killeen, Bell County, Texas." (App. 2). The newsstand operated by McKelva was located at 118-A South First Street in Temple, Texas. (App. 17). There is nothing to show these particular magazines were ever displayed to the public. Cf. *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969). There can be little doubt the Constitutional privilege of self-incrimination also extends to printed or pictorial matter belonging to an individual. Compare *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 64 L.Ed 319, 40 Sup.Ct. 182 (1920); and *Anderson v. Coulter*, 499 P.2d 103 (Ariz. 1972), Cert. denied, 410 U.S. 990, 93 S.Ct. 208 (1972).

What McKelva should or should not have done is really not the question. Was he or was he not entitled to invoke the provisions of the Fifth Amendment is also really not the question; although, if the rights of Petitioner are derivative rights, it may be.

The question is simply, it is submitted, whether or not the mere giving of legal advice to a client, without more, which is accepted by the client, can ever constitute contemptuous conduct on the part of an Attorney? It is respectfully submitted that it cannot be and must never be.

Here, the legal advice given by Petitioner concerned the applicability of the Fifth Amendment to the Constitution of the United States of America. The next case may involve another of our great Amendments. The next case may not even involve any of the Amendments. Where will the line be drawn if this appeal is denied and the case affirmed?

The right to Counsel, as guaranteed by the Sixth Amendment to the Constitution of these United States, made applicable to the States by the Fourteenth Amendment, See *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), is, of course, one of the great rights we all have; for, without such right, many of our other Constitutional rights would be meaningless. See also *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed2d 387 (1970); *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Gideon v. Wainright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed2d 799 (1963); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1438, 18 L.Ed.2d 527 (1967); *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). *This Constitutional right is not simply a right to the assistance of an Attorney at Law, but the right to have the effective assistance of Counsel. More than a warm body is mandated.* (Emphasis italicized). See *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 337 (1940); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 158 (1932); *Entsminger v. Iowa*, 386 U.S. 748, 87 S.Ct. 1402, 18 L.Ed.2d 501 (1967); and *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Texas lawyers have usually pursued their client's Constitutional rights with vigor. See, for example, the cases of

Webb v. Texas, 409 U.S. 95, 34 L.Ed.2d 330, 93 S.Ct. 351 (1972); *Loper v. Beto,* 405 U.S. 473, 31 L.Ed.2d 374, 92 S.Ct. 1014 (1972); *Burgett v. Texas,* 389 U.S. 109, 19 L.Ed2d 319, 88 S.Ct. 258 (1967); *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed2d 923, 85 S.Ct. 1065 (1965); *Greer v. Beto,* 384 U.S. 269, 16 L.Ed.2d 526, 86 S.Ct. 1447 (1966); *Branch v. Texas,* 408 U.S. 238, U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Reh. Denied, 409 U.S. 902, 93 L.Ed.2d 164; *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), Reh. Denied, 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed.2d 118. *Stanford v. Texas,* 379 U.S. 476, 389, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *Clewis v. Texas,* 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Giordenello v. U. S.,* 394, 310, 357 U.S. 489, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958); *Leary v. U. S.,* 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1967); *Orozco v. Texas,* 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969); *Smith v. Hooey,* 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 609 (1969); *Gunn v. University Committee to End the War in Viet Nam,* 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); *Schacht v. U. S.,* 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44, (1970); and *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

However, to fetter this right, by making the mere giving of legal advice, per se, contemptuous conduct, will not only make this a hollow and meaningless right, but will, in fact, render that right impotent.

In this Cause, by this Record, what is sought, by the Respondent, is, it is submitted, a finding that the mere

giving of legal advice, per se, is contemptuous conduct where the client accepts the advice, makes his own decision, invokes the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America, thereby bringing about a frustration of a Court Order in the nature of a subpoena duces tecum. In this, the Respondent should not prevail.

The vice of upholding the Respondent in this Cause lies in the fact that the role of an Attorney at Law will forever be destroyed, for a client to hereafter seek legal advice will be chilled because of fear by the Attorney, in the giving of legal advice, that if he gives the client competent, good faith legal advice, "to jail he, too, may go." The history of the Sixth Amendment to the Constitution abhors the idea, much less the thought that such could occur in these United States, much less in the great State of Texas. "We should not be swayed by the popular cry for a formalistic and narrow interpretation of those provisions which safeguard our fundamental rights." Mr. Justice Douglas, dissenting, in *Couch v. United States,* supra.

The plea here, by the Amicus Curiae, is not that an Attorney at Law is immune from any regulation, by a person or entity, in the practice of law or even in the giving of legal advice to a client. Cf. *Associated Press v. National Labor Relations Board,* 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937); and *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186, 90 L.Ed. 614, 66 S.Ct. 494 (1946).

If a Grand Jury can override a Fifth Amendment claim of a witness only if the witness is granted immunity co-extensive with the privilege against self-incrimination, see

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), then how can a trial judge of the State of Texas override the Fifth Amendment claim of a witness where there is no grant of immunity of any kind? If a Grand Jury cannot compel a person to produce private books and papers that would incriminate him, See *Boyd v. United States,* 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886), how can a trial court judge of the State of Texas do otherwise? This case, of course, is not the factual situation where a Grand Jury witness desires to invoke the exclusionary rule. Cf. *U. S. v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). However, if a Grand Jury's subpoena power is limited, is a Texas trial court's subpoena power also not limited? See *U. S. v. Calandra,* supra.

U. S. v. Calandra, supra, involved a claim of a violation of the Fourth, as well as the Fifth, Amendment to the Constitution of the United States. The only contention raised by this Petitioner is the applicability of the Fifth and Sixth Amendments to his case.

However, is the question that may be overlooked in this cause not: "For what purpose was the magazines sought?" By this Record, it is patently clear the seeking of the magazines was not an act without meaning as, upon production, in light of what previously had occurred, the witness McKelva, through this predicate, would have become amenable to further and future criminal prosecution. The frustration of consummating the subpoena did not deter, nor could it, under State law, the granting of the application for an injunction or the enforcement of the injunction if and when granted. By the Record, the injunction, against the forty-seven (47) subpoena magazines, was placed into effect. If it were the desire of the

City of Temple to get these specific magazines "off the streets" of Temple, Texas, that objective was accomplished. The overriding of the Fifth Amendment rights of McKelva was truly incidental to what was sought unless, as shown by implication from this Record on Appeal, the City Attorney and the trial judge were attempting to do what even a Grand Jury may not do. See *U. S. v. Calandra, supra.*

Perhaps, Mr. McKelva merely adopted the age old addage that one may beat the rap [the prospective and ever looming future criminal accusation] but not necessarily the ride. Can it not be argued that he decided it best to serve a contempt punishment rather than to face the prospect of another criminal accusation? The maximum punishment for contempt of Court, under Art. 1911a, V.A.T.C.S., is a mere six (6) months' confinement and a $500.00 fine, together with court costs. The maximum punishment for violating Art. 527, V.A.T.P.C., then in effect, first offender, was by fine not exceeding $10,000.00 and six (6) months in jail, together with court costs. If a second offender, the person was to be punished as a felon, if found guilty, with his punishment not to exceed a fine of $25,000.00 and punishment in the penitentiary not to exceed five (5) years. Except for the prosecution by the City, from this Record, it is unknown what McKelva's past transgressions of the law, if any, were or may have been.

The contempt judgment against McKelva was, of course, predicated upon the fact that McKelva did not honor the subpoena duces tecum by not bringing the magazines to Court. The subpoena, See App. 2-4, provided for McKelva *to appear and testify* as well as "bring with him and produce, at the time and place aforesaid,

certain magazines . . ." and he [was to] continue his attendance from day to day and from term to term, until discharged by the court *or by the said William T. Wilson* [the City Attorney]. (Emphasis italicized).

The contempt was not predicated upon the fact of non-appearance.

Of course, it is difficult to see how the questions asked by the City Attorney could, per se, be incriminating. (See App. 17-18), (App. 22). The "incrimination" here would have occurred only if the magazines had been produced; not whether he had them. The trial judge so held: "Mr. McKelva, you have been adjudged to be in contempt of this Court for having failed to observe a subpoena duces tecum to bring certain matters with you as a witness." (App. 27).

Again, however, what difference does this really make to this lawsuit? The judgment of contempt before this Honorable Court is not McKelva's, but the Petitioner's. "I have found you [the Petitioner] in contempt because you have usurped the authority of the Court." (App. 31).

If the rights of Petitioner, as to the giving of legal advice to the client, McKelva, are dependent or derivative of the rights of the client, McKelva, as provided by the Fourth, Fifth and Sixth Amendments, as made applicable to the States through the Fourteenth, then, of course, it is not only important that McKelva's rights be discussed and considered, but the end result to be reached could possibly be determinative of the decision to be reached if that is the approach one took; i.e., if the Attorney advises the client and it is later determined that the advice encompassed the invocation of the Constitution of the United States, or certain parts thereof, and the client did

invoke same, based on that legal advice, whatever it may have been, but it turns out that the client did not, in fact, have any legal right to invoke, does this make a difference? It is respectfully submitted it should not as the issue here is whether or not the mere giving of legal advice to a client, which advice was given in good faith, which advice was accepted by the client and used by the client in invoking provisions of the Constitution, is sufficient to ever constitute contemptuous conduct or to support a judgment of contempt of court.

Is there a difference between the factual context in the two cases of *U. S. v. Dionisio*, 410 U.S. 1, 93 St.Ct. 764, 35 L.Ed.2d 67 (1973), and *Mara v. U. S.*, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973), and this one? The only real difference is there a Grand Jury issued a subpoena for a witness to bring his body and his voice or his hand to Court and give a voice exemplar and/or a handwriting and printing exemplar. Here, the subpoena directed McKelva to bring certain documents and testify.

However, it appears that in light of what the Court has said in the two cases cited that the legal advice of Petitioner was also sound advice, as this type seizure, whether it be by a Grand Jury or otherwise, would not be legal, where the client has exercised his rights under the Fifth Amendment to the Constitution.

In *U. S. v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d (1973), the majority of the Court, speaking through Mr. Justice Stewart, considered the applicability of the Fourth Amendment to a Grand Jury seeking to obtain voice exemplars from a witness' voice, *"not for the testimonial or communicative content of what was to be said."* Thus, there were no Fourth Amendment rights violated.

The Court said, however:

> This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See *Boyd vs. United States*, 116 U.S. 616, 633-635. The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms "to be regarded as reasonable." *Hale v. Henkel*, 201 U.S. 43, 76; cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 217. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motion to quash. . . .

In *U. S. v. Mara* a/k/a Marasovich, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed. 2d 99 (1973), the Court reversed a lower court decision which had struck down a subpoena issued to a witness for him to produce handwriting and printing exemplars. The Court held this did not constitute an unreasonable search and seizure.

Mr. Justice Marshall, in dissenting in Mara, supra, said:

> . . . Like Davis, the present cases involve official investigatory seizures which interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.
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> First, in *Hale v. Henkel*, 201 U.S. 43, 76 (1906), the Court held that a subpoena duces tecum order-

> ing "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far to sweeping in its term to be regarded as reasonable." Considered alone, Hale would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people . . .
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> . . . In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Ullmann v. United States*, 350 U.S. 422, 439 n. 15 (1956); *Piemonte v. United States*, 367 U.S. 556, 559 n. 2 (1961); *Wilson v. United States*, 221 U.S. 361, 372 (1911); *Hale v. Henkel*, 201 U.S., at 65. See also *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Brown v. Walker*, 161 U.S. 591, 600 (1896); *Garland v. Torre*, 259 F.2d 545, 549 (C.A. 2), cert, denied, 358 U.S. 910 (1958). . . .
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> . . . . In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . .' " *Harris v. United States*, 331 U.S. 145, 150 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable

governmental intrusion—*Camara v. Municipal Court*, 387 U.S. 523 (1967)—upon the privacy and liberty of the individual, see, e.g., *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Jones v. United States*, 362 U.S. 257, 261 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is expected from its requirements. Cf. *Coolidge v. New Hampshire*, 403 U.S. 347, 357 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U.S., at 528-529. The reason for any exception to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impeachment of the rights for the protection of which [the Amendment] was adopted." *Go-Bart Importing Co. v. United States*, 282, U.S. 344, 357 (1931); cf. *Grau v. United States*, 287 U.S. 124, 128 (1932). . . .

. . . Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information, is sought directly from a particular criminal suspect, the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

But when we move beyond the realm of a grand jury investigation limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the Grand Jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in *Davis v. Mississippi*, they may now accomplish indirectly through the grand jury process. . . .

. . . Consistent with the Court's decision in *Hale v. Henkel*, it ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 U.S., at 76. This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F.2d 580, 584-585. And, in elaborating on the requirement that the request not be "excessive" it added that the Government would bear the burden of showing that it was not conducting "a mere general fishing expedition under grand jury sponsorship" I.d., at 585 . . .

Therefore, the type procedure involved here, of the State (City) issuing a subpoena duces tecum for a witness to bring to Court certain possibly incriminatory magazines,

where the State or Government has not shown a reasonable right thereto, is violative of the provisions of the Fourth Amendment to the Constitution of the United States. Further, to require a witness to bring to Court certain possibly incriminatory magazines, if the witness felt that to either identify the magazines, testify concerning the magazines, etc., this would incriminate himself, then, without some form of immunity being granted, the witness should be able to invoke his rights to self-incrimination under the Fifth Amendment.

The compulsion, in honoring the subpoena duces tecum, is the compulsory production of magazines. Cf. *Boyd v. United States,* supra. The testimonial compulsion present here, as to McKelva, would be in the realm of identification of the magazines. There is no showing by this Record that *these* magazines were ever exposed to the public.

To uphold this action, as to McKelva, would, of course, stretch what Mr. Justice Douglas said in his dissent one more peg.

> . . . The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulations then was the historic grand jury . . .

Also:

> . . . The determination as to whether a contempt has been committed does not depend on the intention of the offending party, but on the act which he has done . . . See Edward M. Dangel, *Contempt,* at page 179, Section 409.

Here, the contempt of McKelva was the refusal to honor the subpoena duces tecum. For what was the contempt of Petitioner other than the giving of legal advice

which has been now judicially determined to be sound legal advice?

Nor, should it be claimed that the action of McKelva forever precluded the State from seizing the magazines. In *Bryers v. State,* Tex.Cr.App., 489 S.W.2d 712, 719, where the Court of Criminal Appeals of Texas struck down a conviction because the Court did not have the entire film of the allegedly "obscene" movie before it, the Court said:

> . . . And a vigorous enforcement of these laws in the area of motion pictures [magazines] is not inconsistent with the evidentiary rule here announced. In response to the action of the courts Sec. 9 of Article 527, supra, has been reenacted with substantial modifications which detail the procedure to be followed in seizing a film or other allegedly obscene material with a search warrant . . .
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> . . . Nor is the criminal process the only remedy available to the State. Article 527, Section 13 authorizes injunctive proceedings, and the section has been held unconstitutional, *State v. Scott,* 460 S.W.2d 103 (Tex. 1970), and has recently been effectively utilized to enjoin the sale of obscene films. *More v. State,* 470 S.W.2d 391 (Tex.Civ.App. San Antonio 1971, writ ref'd n.r.e.). . . .

Thus, in the State of Texas, the State has two (2) remedies available for seizing allegedly "obscene" material and getting it off the streets. One method is through the application of the Penal Statutes, See then Arts. 527 and 534b., V.A.P.C., (Cf. the New Texas Penal Code, Art. 43.23, effective January 1, 1974). Another method is through the application for an injunction. See Art. 4667, V.A.T.C.S. However, if the seizure of the particular mat-

ter is sought, under the criminal statute, then it was necessary to seek a search warrant duces tecum. Art. 527, Sec. 9, Sub-section(c), V.A.P.C., *then prohibited*, at a hearing on the affidavit for the issuance of a search warrant, the Magistrate from ordering the particularly alleged offensive material to be produced by the *adverse party*. "The Magistrate's order as to notice and hearing shall give the adverse party the right appear and produce the matter described in the affidavit for a search warrant, *but shall not in any manner require him to produce the said matter.*" (Emphasis italicized).

Thus, what relevancy, to the hearing on the City's application for an injunction, the subpoena duces tecum had to the end result of the lawsuit escapes Counsel for the Amicus Curiae at the present time. To satisfy the curiosity of the City Attorney or the trial judge, perhaps, but for what purpose other than that? It was not necessary to produce the magazines in order to obtain the injunction. Was it in fact not for the laying of a predicate for future criminal action against McKelva? Can there be reached any other conclusion than that from this Record?

As recently as *Bray v. State*, 1972, Tex.Cr.App. 478 S.W.2d 89, the Court of Criminal Appeals of Texas emphasized that once a member of the bar undertakes to represent an accused, counsel is bound by all "fair and honorable means to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law."

Certainly it is clear in this case that Petitioner did not engage in any contumacious conduct or profane or disrespectful language in Court; Petitioner has not been and is not now accused of advancing some frivolous theory or objection.

In *MacInnis v. United States*, 191 F.2d 157 (9th Cir. 1951), that Court vehemently condemned the conduct of the attorney in addressing the Court and emphasized that counsel never has the right to let his temper, zeal, or intention lead him into disrespectful accusative language to the Court. Such conduct only acts to demoralize the authority of the trial court in the eyes of the jury and the public and it is the obligation of the trial court to maintain order and decorum in its presence. Such conduct was not present in this case.

In *Hallinan v. United States*, 182 F.2d 880 (9th Cir. 1950), the Court stated that a lawyer worth his salt has an obligation to utilize every legitimate effort in support of his client's cause and in so doing will be relieved from an improper contempt judgment.

In re Osborn, 344 F.2d, 611 (9th Cir. 1965), that Court condemned the attorney's refusal at trial to proceed with cross-examination when ordered to do so, but made it clear that the Court expected counsel to perform in a "fearless, vigorous and effective" manner while representing his client. The Court emphasized, however, that Osborn was at no time attempting to preserve any legal point or any legal contention; he simply refused to permit the trial court to run the court and made slight comments in this attempt.

In the case at bar, it is all too obvious that the course of action suggested by Petitioner had only one goal, that of preserving the client's Fifth Amendment rights against self-incrimination, which rights were vigorously and timely invoked by Petitioner at the commencement of the injunction hearing.

In *United States vs. Schiffer*, 351 F.2d, 91 (6th Cir. 1965), that Court considered and condemned the contemptuous remarks and charges directed at the trial court by counsel, and stated that while counsel had a right to forcefully present his claims to the court in order to obtain a ruling, even though the present conditions may be "far-fetched and untenable", counsel had no right to resist or insult the court after he had obtained a ruling. If counsel felt the ruling was erroneous, counsel had "an adequate remedy to review it by way of appeal". Schiffer, supra, at 94. As already stated, Petitioner in this case had no right of appeal but fully exposed his client to any repercussions which might evolve from the production of the documents.

While distinguishable in many respects, an analogous situation was presented in Appeal of *United States Security Exchange Commission*, 226 F.2d, 501 (6th Cir. 1955), wherein the Federal District Judge held in contempt of court the general counsel for declining to produce certain confidential intra-agency reports of the commission's investigation on the ground of the commission's rules of privilege. In setting aside the judgment of contempt, the Court stated in part that ". . . An attorney is entitled to consideration of a claim privilege not to disclose information which he honestly regards as confidential and should not stand in danger of imprisonment for asserting respectfully what he considers to be lawful rights". It is interesting to note that the general counsel asserted the privilege in his own behalf and the court upheld his right to do so; in the case at bar Petitioner advised and counseled his client who then asserted his privilege, and yet Petitioner was held in contempt.

In *Sacher v. United States*, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed 717 (1952), the Court spoke to the role and responsibilities of counsel at trial in protecting and preserving his client's rights:

> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, would do allowance for the heat of controversy, will be protected by Apellant Courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal.
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> * * * * *
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> But that there may be no misunderstanding, we make clear that this court, if it's aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processors of orderly trial, which is the supreme object of the lawyer's calling."

In *Walker et al. v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 184, 18 L.Ed.2d 1210 (1967), certain demonstrators had been enjoined from marching in the streets and notwithstanding the availability of the legal process to modify or set aside the injunction, it was ignored and deliberately defied. The judgment of contempt was upheld and in its opinion this Court emphasized that Petitioners had chosen to disregard the rule of law and ignore all legal procedures and instead carry their battle to the streets. In the case at bar, there was no appeal from an adverse judgment by the trial court and the client therefore faced the predicament of irretrievably waiving his rights by submitting to the subpoena Duces Tecum in delivering the

books in question in open court or asserting his constitutional rights based upon the Fifth Amendment in refusing to obey the mandate of the subpoena. There was no alternative to test the validity of the court order other than the election made by Petitioner's client in this case.

In re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962), this Court set aside a judgment of contempt, holding that the remarks of counsel did not obstruct the court in the performance of it's judicial duty. This court emphasized in part that it is essential to the fair administration of justice that counsel be able to assert honest, good faith efforts to present their client's cases.

In re Marshall, 423 F.2d, 1130 (5th Cir. 1970), the Court noted that the power of holding an attorney in contempt is broad, certainly there are guidelines which should be taken into consideration. In contempt cases against lawyers the court stated that all of the evidence must be carefully examined in order to insure that there is "no undue interference with the attorney-client relationship". The Court cited the case of *Parmelee Transportation Company v. Keeshin* 294 F.2d, 310 (7th Cir. 1961) for the proposition that the contempt power must be invoked sparingly and only when clearly demonstrated that the conduct in question is contumacious and tends to bring the administration of justice into disrepute as opposed to a situation wherein counsel's conduct is that of a "determined level-headed practitioner who is acting respectfully to the court under considerable pressure in a lengthy and important trial". See also United States ex rel *Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).

In re Dellinger, 461 F.2d 389 (7th Cir. 1972), the Court recognized the delicate line to be drawn between

vigorous advocacy and obstruction of justice and the resulting chilling effect to effective advocacy in a client's behalf. The court emphasized that the line defied any strict delineation but did suggest that doubts should be resolved in the favor of advocacy in order to assure an unintimidated bar. See also United States ex rel *Robson v. Oliver*, 470 F.2d 10 (7th Cir. 1972).

Petitioner submits that any client is entitled to a counsel's independent evaluation of what legal course should be taken and followed by the client. If the rules adopted which permits counsel to be held in contempt of court for advising a client in a situation such as that faced in the case at bar with contempt of court for so much as suggesting the client assert his Fifth Amendment rights, counsel will be faced with the obvious predicament of a conflict of interest between the disposition of his client's case and the very real possibility of counsel himself being subjected to criminal contempt and its resultant penalties. Counsel would then face a choice between his own self interest and the best interests of his client. To place counsel in such a position is to effectively deny his client's right to the effective representation and counsel of his chosen lawyer as commanded by the Sixth Amendment. A concomitant effect is to destroy the confidential relationship between attorney and client.

Therefore, are not the answers to the questions concerning Petitioner's case covered by the due process clause of the Fourteenth Amendment to the Constitution of the United States? Is due process of law not violated by a contempt of court judgment which is not justified by the evidence? See *Holt v. Virginia*, 381 U.S. 131, 14 L.Ed. 290, 85 S.Ct. 1375 (1965); *Johnson v. Mississippi*,

403 U.S. 212, 29 L.Ed. 423, 91 S.Ct. 1778 (1971); and *Mayberry v. Pennsylvania,* 400 U.S. 455, 27 L.Ed. 532, 91 S.Ct. 499 (1970).

If there is a per se rule to be adopted from this case, then it should be that the mere giving of legal advice, by a licensed attorney at law, to his client, pursuant to the Sixth Amendment of the Constitution of the United States, and the client, by accepting the advice, invokes certain provisions of the Constitution of the United States, which, as a result thereof, may thwart a trial court's processes, can never be contemptuous conduct on the part of the Attorney at Law. To hold otherwise, it is submitted, a violation of due process of law, under the Fourteenth Amendment to the Constitution of the United States of America, will result and the right to counsel, both in the civil law as well as in the criminal law fields, will truly become an impotent legal right under the law.

CONCLUSION

Whether this Honorable Court adopts the rationale of Petitioner himself that, under the Fifth and Sixth Amendments to the Constitution of the United States, he is entitled to relief, or, whether the Court adopts the rationale of the Amicus Curiae, that under the due process clause of the Fourteenth Amendment the judgment of contempt is null and void, the judgment of contempt should be, nevertheless, in all things, reversed and Petitioner, MICHAEL ANTHONY MANESS, should in all things be Ordered discharged from the judgment of contempt and allowed to go hence, without further delay therefrom,

back to the private practice of law to give legal advice to those persons who come to him and seek same.

Respectfully submitted,

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CERTIFICATE

This is to certify, that I MARVIN O. TEAGUE, on this the _____ day of October, A.D. 1974, did deliver to HONORABLE JOHN L. HILL, Attorney General, State of Texas, at his usual place of business, Supreme Court Building, State Capitol, Austin, Texas, to the attention of Hon. Joe Dibrell, Assistant Attorney General, Attorney for Respondent, Hon. James R. Meyers, one (1) copy of said Brief for the Amicus Curiae, Texas Criminal Defense Lawyers Association, by depositing same in the United States Mail, certified return receipt requested.

MARVIN O. TEAGUE

CERTIFICATE

This is to certify, that I, MARVIN O. TEAGUE, on this the _____ day of October, A.D. 1974, did deliver to HON WILLIAM F. WALSH, 1955 Richmond Avenue, Houston, Texas 77006 and HON. STUART M. NELKIN, 4635 Southwest Freeway, Houston, Texas, 77027, Counsel for the Petitioner, one (1) copy of said Brief for the Amicus Curiae, Texas Criminal Defense Lawyers Association, by depositing same in the United States Mail, certified return receipt requested.

MARVIN O. TEAGUE

Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-689

MICHAEL ANTHONY MANESS, *Petitioner*,

versus

THE HONORABLE JAMES R. MEYERS, *Respondent*.

On Writ of Certiorari To The 169th Judicial District Court of Bell County, Texas

REPLY BRIEF FOR THE PETITIONER

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October 1974

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REPLY BRIEF FOR THE PETITIONER

Since most of the Respondent's arguments have been anticipated and answered by the Petitioner's main brief, this Reply Brief will be limited to several issues which the Petitioner believes are of particularly critical significance to the ultimate disposition of this cause.[1]

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1. Although the briefs of the parties have phrased and analysed the questions presented for review in different argumentative terms, there appears to be no genuine dispute that the ultimate issue for decision by the Court is whether, on this record, the Petitioner's advice to his client was constitutionally punishable by a judgment of criminal contempt.

1. A respectful strategic refusal to comply with a Trial Judge's order directing production of testimonial or documentary evidence by an individual who reasonably believes in good faith that he is privileged from producing the evidence has invariably been regarded by this Court as an appropriate, permissible and altogether legitimate alternative to involuntary compliance.

The totality of the Respondent's position is grounded ultimately on the insupportable assertion at page 7 of his brief that "the state court's order to produce the magazines *should have been obeyed* (even if, for the purpose of argument, the order was illegal), and counsel *should not have been given* by Petitioner to McKelva to disobey the order" (emphasis added). Page 9 of the Respondent's brief mistakenly reorchestrates the same theme by asserting that the Petitioner's client was under "the duty to produce the magazines even though the court's order was erroneous in overruling the claimed privilege."

In reality, this Court has consistently recognized that an individual whose claim of an evidentiary or constitutional privilege has been rejected by a Trial Judge may nevertheless lawfully test his entitlement to the asserted privilege in a higher forum by refusing to comply with a court order directing him to produce the allegedly privileged evidence. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Hickman v. Taylor*, 329 U.S. 495 (1947); *United States v. Caldwell*, 408 U.S. 665 (1972); *cf. United States v. Reynolds*, 345 U.S. 1 (1953). The most recent example

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Consequently, the Petitioner does not rely on other alternative grounds that might conceivably support a reversal of his conviction—for example, possible claims that the judgment of contempt was imposed in a manner that failed to comport with procedural due process of law. *Cf. In re Green*, 369 U.S. 689 (1962).

involved the refusal by the President of the United States, on a claim of unqualified executive privilege, to comply with a District Court order directing him to produce tape recordings of presidential conversations. *United States v. Nixon*, ____U.S.____ [42 U.S.L.W. 5237, July 24, 1974]; see also *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir., 1973).

The controlling principles are provided by the Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971). Ryan sought relief from an unappealable interlocutory order directing him to comply with what he contended was an illegal subpoena duces tecum, arguing that substantial burdens associated with compliance justified immediate review of the order. The Court rejected the claim in the following terms:

> "Of course, if [Ryan] complies with the subpoena, he will not thereafter be able to undo the substantial effort he has exerted in order to comply. *But compliance is not the only course open to* [*him*]. If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, *he may refuse to comply* and litigate those questions in the event that contempt or similar proceedings are brought against him. * * * [the law provides] *a choice between compliance* with a trial court's order to produce prior to any review of that order, *and resistance* to that order with the concomitant possibility of an adjudication of contempt if [the] claims are rejected on appeal." 402 U.S. at 532-33 (footnotes omitted; emphasis added).

In short, contrary to the Respondent's mistaken impression, the Petitioner's client unquestionably enjoyed an indisputable legal right to persist in his claim of the Fifth Amendment privilege, even after the Trial Judge had rejected it. *Stevens v. Marks*, 383 U.S. 234, 246 (1966);

cf. United States v. Dickinson, 465 F.2d 496, 512 (5 Cir., 1972). Because immediate appellate review of the Judge's adverse ruling was not available, *Walker v. City of Birmingham*, 388 U.S. 307 (1967) and the other decisions cited at pages 9-11 of the Respondent's brief are not in point. *United States v. Ryan*, 402 U.S. at 532, n. 4.

Of course, involuntary compliance with the Judge's order to produce the magazines (coupled with a motion to suppress their use as evidence in any subsequent criminal proceedings) was *one* of the alternatives available to the client. *United States v. Blue*, 384 U.S. 251, 255 (1966). The Respondent's confusion arises from the misapprehension that it was the *only* alternative (A. 32). Obviously it was not.

2. An attorney who reasonably believes in good faith that his client's Fifth Amendment privilege against self-incrimination would be jeopardized by compliance with a Trial Judge's order directing production of testimonial or documentary evidence is constitutionally entitled to advise and counsel his client to refuse compliance with that order.

In light of *United States v. Ryan* the Respondent cannot realistically persist in his contention that the Petitioner's client was legally obligated to produce the forty-seven magazines following the Trial Judge's rejection of the asserted Fifth Amendment privilege. Logically, the Respondent can retrench to only one other position: although the client was legally entitled to disobey the court order directing production of the magazines, his attorneys were not legally entitled to advise him to do it. The implications of such an argument destroy it.

For example, when the Respondent asserts that "counsel should not have been given * * * to disobey the order," he presumably believes that the attorneys for the President in *United States v. Nixon* would have been guilty of contemptuous conduct if they had advised their client not to comply with the District Court's order on grounds of executive privilege. From this perspective Mr. Buzhart, Mr. St. Clair and Professor Wright could have stated their professional opinions regarding the possible validity or invalidity of Judge Sirica's order to produce the tapes but could not have advised the President of the United States whether or not to comply with it, even if he had specifically requested such advice from them.[2]

Imposing and defending a judgment of criminal contempt against an attorney on the basis of this sort of reasoning reflects, even when viewed most charitably, an astonishing and unexplainable insensitivity to the historical and contemporary obligations of the legal profession in our adversary system.[3] At the very least those obliga-

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2. Regrettably, the Respondent has not yet explained how presidential counsel (or, for that matter, any other lawyer) should respond if his client persistently demands to know which of the available legal alternatives sanctioned by *United States v. Ryan* should be pursued. An obdurate silence would appear to be no more appropriate than the answer, "I can't advise you what to do because advice based on my honest professional opinion would constitute a contempt of court."

With respect to the conceptual futility of the Respondent's attempted distinction between "advice" that a court order is unconstitutional under the Fifth Amendment and "advice" to disobey the order, see Note, "Liability of the Lawyer for Advising Disobedience," 39 Col.L.Rev. 433, 435-38 (1939).

3. "The primary role of counsel is to act as champion for his client. In this capacity he is the equalizer, the one who places each litigant as nearly as possible on an equal footing under the substantive and procedural law under which he is tried. Of course, as a practical matter he does this not by formally educating the client on every

tions demanded that the Petitioner attempt to preserve his client's claim of Fifth Amendment rights—not to undermine that claim by silence, inaction or timidity. *Harders v. California*, 373 F.2d 839, 842 (9 Cir., 1967).

Thus, regardless of whether the Petitioner's conception of the Fifth Amendment privilege is ultimately proven correct,[4] *United States v. Ryan* and the cases previously cited provided his client with an indisputable legal right to do precisely what his attorneys advised—to respectfully decline to comply with the Trial Judge's order directing production of the magazines until all available judicial avenues for relief from that order had been exhausted.[5]

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legal aspect of the case, *but by taking those procedural steps and recommending those courses of action which the client, were he an experienced advocate himself, might fairly and properly take.* A lawyer cannot be timorous in his representation. Courage and zeal in the defense of his client's interest are qualities without which one cannot fully perform as an advocate" (emphasis added). "The Lawyer as Professional Advocate" in *The Administration of Criminal Justice* (American Bar Association Project on Standards for Criminal Justice, 1974) at pp. 109-110.

"The defendant needs counsel not only to evaluate the risks and advantages of alternative courses of action * * * but also to provide a broad and comprehensive approach to his predicament which will take the most advantage of the protections and benefits which the law affords him. * * * [T]here are circumstances in which a lawyer must be vigorously aggressive if important rights are not to be undermined by an excess of cooperation with the court." *Id.* at pp. 112-13.

4. One of three indistinguishable District Court decisions cited at page 56 of the Petitioner's main brief in support of the Fifth Amendment claim has since been *summarily* affirmed by the United States Court of Appeals for the Sixth Circuit. *Smith v. Fair*, 363 F.Supp. 1021 (N.D. Ohio, W.D., 1973), *affirming without opinion*, 495 F.2d 1373 (6 Cir., 1974), *cert. pending*, 43 U.S.L.W. 3127 (September 10, 1974).

5. Although the Judge might have confined Michael McKelva under a *civil* (coercive) contempt judgment pending such review, *Shillitani v. United States*, 384 U.S. 364 (1966), the indiscriminate

Until now it has never been seriously suggested that an attorney has acted in a contemptuous or professionally irresponsible manner simply by having counseled his client to preserve a claimed Fifth Amendment privilege by refusing to comply with an unreviewed court order directing production of the evidence for which the privilege is claimed. Good-faith advice of that sort is not now and has never been constitutionally punishable by a judgment of criminal contempt. *In re Watts*, 190 U.S. 1, 29 (1903); *cf. Holt v. Virginia*, 381 U.S. 131 (1965); *In re McConnell*, 370 U.S. 230, 236 (1962).

3. The Trial Judge erroneously rejected the claim of the Fifth Amendment privilege against self-incrimination.

The Respondent's reliance on *Bellis v. United States*, ___ U.S. ___ [42 U.S.L.W. 4788, May 28, 1974] is misplaced. *Bellis* reiterates the established proposition that "an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally." 42 U.S.L.W. at 4789. In the present case the privilege was claimed, not for business records lawfully possessed, but for magazines that were sought and withheld only on the theory that the very *fact* of possessing them for public sale or distribution might have constituted a criminal offense. That distinction is controlling.

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imposition of punitive criminal contempt sanctions against both client and counsel was in itself flagrantly unconstitutional because it unnecessarily tended to discourage a bona fide claim of Fifth Amendment rights. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973) and related decisions cited on page 52 of the Petitioner's main brief.

Moreover, the *dictum* in the *Bellis* opinion that "corporate records do not contain the requisite element of confidentiality or privacy *essential for the privilege to attach*" (emphasis added). 42 U.S.L.W. at 4791, is simply not sustainable to the extent it suggests that a person may not invoke the privilege to resist an official demand for testimonial or documentary evidence that is *not* characterized by some undefined degree of "confidentiality" or "privacy." A subpoena duces tecum for an allegedly obscene publication or film that has been publicly displayed is no different in principle from a subpoena directing an individual to testify before a grand jury to the "public" facts that have previously been voluntarily revealed to the police by his own handwritten confession. In either event, because it is "the extortion of information *from the accused himself* that offends our sense of justice" (emphasis added), *Couch v. United States*, 409 U.S. 322, 328 (1973); *Holt v. United States*, 218 U.S. 245, 252 (1910), the communicative content of the evidence so extorted (whether "confidential" or not) is altogether irrelevant.

Michael McKelva's claim of the Fifth Amendment privilege obviously should have been sustained.

CONCLUSION

For the foregoing reasons the Petitioner respectfully suggests that the judgment of criminal contempt should be reversed and the Petitioner ordered discharged.

Respectfully submitted,

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